Supreme Court, U.S.
FILED

No. 10-90 JUL 13 2010

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In The

Supreme Court of the United States

UNITED FINANCIAL SYSTEMS, CORPORATION, *et al.*,

Petitioners,

v.

STATE OF INDIANA, EX REL. INDIANA STATE BAR ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Indiana

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state supreme courts can order the disgorgement of fees for the "unauthorized practice of law," without violating due process or the vagueness doctrine, where the court has not provided a clear definition of the offense and there is no prior case precedent prohibiting the conduct at issue.

2. Whether the prosecuting organization, by requesting a substantial monetary payment from the Petitioners, injected a personal financial interest into the proceeding such that the Petitioners' due process rights were violated.

3. Whether the Indiana Supreme Court violated the individual Petitioners' due process rights by finding them guilty of the "unauthorized practice of law" and holding them jointly and severally liable for the disgorgement of fees collected by the corporate Petitioner, absent specific findings regarding the individuals and their lack of ownership interest in or control over the corporation.

INTERESTED PARTIES

Petitioners United Financial Systems, Corporation ("UFSC"), an Indiana corporation created on 10/22/82; Richard Follett, individually and acting in a representative capacity; Jayne A. Follett, individually and acting in a representative capacity; Richard L. Follett II, individually and acting in a representative capacity; Beau R. Follett, individually and acting in a representative capacity; James Boyles, individually and acting in a representative capacity; Raymond C. Phillips, individually; Sharon Dorsey, individually; Sherry Jordan, individually; Jody Waugh, individually; Gary Lovelady, individually; and John Joyce, individually (collectively, the "Petitioners").

Respondent State of Indiana, ex rel. Indiana State Bar Association.

CORPORATE DISCLOSURE STATEMENT

Since 1/1/2009, UFSC has been a wholly owned subsidiary of United Financial Resources Corporation ("UFR"), a Delaware corporation. UFR is wholly owned by the Jayne A. Follett Family Limited Partnership ("JAFFLP"). Prior to 1/1/2009, UFSC was wholly owned by JAFFLP. No publically-held corporation owns any stock in either UFSC or UFR.

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STATEMENT OF BASIS FOR JURISDICTION

The Indiana Supreme Court issued its decision on April 14, 2010.

This Court has jurisdiction under 28 U.S.C. § 1257.

28 U.S.C. § 2403(b) may apply, and this Petition has been served on the Indiana Attorney General.

CONSTITUTIONAL PROVISIONS INVOLVED

The due process clause states in part that "[n]o person shall be . . . deprived of . . . property, without due process of law." U.S. Const. amend. V. This clause is made applicable to the States through the Fourteenth Amendment, which states "nor shall any State deprive any person of . . . property, without due process of law." *Id.* at amend. XIV, § 1.

STATEMENT OF THE CASE

This case involves an Indiana Supreme Court order holding a corporation and certain individuals

charged with the unauthorized practice of law ("UPL") jointly and severally liable for fees collected by the corporation, absent a definition of the offense by the Indiana Supreme Court, as there is no Indiana precedent prohibiting the conduct at issue. This case is of critical national importance, implicating due process concerns and the vagueness doctrine, now that the emerging trend among States is to impose monetary sanctions for UPL violations in the absence of due process procedural protections.

This case is also of critical national importance because this Court must clarify that the due process clause is violated when a prosecutor requests a direct monetary payment in exchange for a promise to lower the charges against the accused. The prosecutor in this case requested a substantial monetary payment from the Petitioners, but was nonetheless permitted to continue prosecuting the case after the Petitioners refused that request.

1. Factual Background

The corporate Petitioner, UFSC, was an agency in the insurance marketing industry that also offered estate planning assistance services. The basic business model concerning the estate planning assistance services was as follows: non-attorney representatives would make educational presentations regarding probate and the estate planning assistance services programs offered by UFSC in prospective customers' homes. The prospective customer would indicate the

program in which he or she was most interested and would usually provide payment for that program.

The prospective customer's information was then forwarded to a licensed Indiana attorney, referred to as a Panel Attorney, who would contact the prospective customer, execute an engagement letter, determine what estate planning documents were most appropriate, and draft those documents. If the attorney determined that an individual would not benefit from an estate plan, a full refund was provided. A non-attorney representative would then deliver the finished estate plan to the customer and would assist the customer in executing the plan in accordance with written instructions provided by the attorney.

Prior to this case, there was no Indiana case law regarding whether non-attorney representatives could give educational presentations about probate and deliver estate planning documents to customers if licensed Indiana attorneys individually assessed each person's estate planning needs and drafted all legal documents. Additionally, the Indiana Supreme Court had specifically held that certain companies could employ attorneys to perform legal work for customers. *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, 160 (Ind. 1999). As a result, UFSC believed, and was advised by outside legal counsel W. William Hodes, that its business model was lawful. Mr. Hodes was retained by UFSC to ensure that its business model did not violate Indiana's UPL prohibition. He obtained his undergraduate degree from Harvard, obtained his law

degree from Rutgers, practiced law for approximately 8 years, taught law school for over 20 years, completed a judicial clerkship for Justice Ruth Bader Ginsberg, and is co-author of the treatise "The Law of Lawyering," making him well-qualified to assess whether conduct constitutes UPL.

2. UPL Proceeding

On October 9, 2008, the Indiana State Bar Association (the "ISBA") filed a petition on behalf of the State of Indiana, charging the Petitioners and others with engaging in UPL in violation of Rule 24, Indiana Rules For Admission To the Bar and Discipline of Attorneys ("Rule 24"). The petition sought an injunction and the disgorgement of fees collected by UFSC. Petitioners contested the UPL charges, arguing that UFSC's business model did not constitute UPL. A Commissioner was appointed by the Indiana Supreme Court to preside over the factual aspects of the proceeding.

In approximately March 2009, the ISBA made what it termed a "settlement offer" to the Petitioners, offering to limit the charges against them to the past two years if the Petitioners made a substantial monetary payment directly to the ISBA, paid the costs of the proceeding and the ISBA's attorney's fees, and admitted to engaging in UPL. This offer, other than the amount of the payment that was to be made, was memorialized in writing by the ISBA in a letter dated April 1, 2010, which stated in relevant part:

> You may wish to explore with [UFSC] the prospect of a contribution to the [ISBA] which is reflective of the amount the company and principals risk losing via disgorgement. In exchange, the [ISBA] may agree not to seek disgorgement on any plan beyond the two (2) year period which you have asserted as legitimately at issue. . . . As part of any resolution, [UFSC] would pay all of the costs of these proceedings, which would include . . . the ISBA's attorney fees and expenses incurred to prosecute this matter. . . . The funds contributed to the [ISBA] could be designated for use by the Board of Governors and/or the Unauthorized Practice of Law Committee to use in the education of the public on this topic, enforcement of UPL or otherwise as the Board would deem appropriate.

The Petitioners rejected the offer.

On April 9th and 16th, 2009, the Petitioners filed a motion for protective order and a motion to dismiss, respectively, raising due process arguments, including vagueness, and contending that the ISBA had unconstitutionally injected a personal financial interest into the proceeding. On April 16, 2010, the Petitioners filed a motion to dismiss certain individuals from the proceeding, arguing that the individuals had not personally been accused of engaging in any UPL conduct, but had instead merely been included in the petition as part of a laundry-list of individuals who had some former connection to UFSC. On May 18,

2009, all of these motions were denied by the Commissioner without opinion. (*See* App. 58-60.)

Beginning on May 27, 2009, the Commissioner held a three-day fact-finding hearing. During this hearing, Attorney Hodes testified that he advised UFSC that its business model was a lawful third-party payor regime, analogous to when an insurance company hires a lawyer for an insured. Hodes testified that the Indiana Supreme Court had expressly approved insurance company third-party payor arrangements through case law; that neither an insurance company nor any other person who hires a lawyer on behalf of someone else is practicing law; rather, they are hiring someone else to practice law; and that UFSC's business model was superior to insurance models because insurance companies maintain control over the attorney-client interaction through cooperation clauses in customer contracts, whereas UFSC did not.

During the hearing, counsel for the Petitioners moved to admit evidence regarding the purported "settlement" offer made by the ISBA, in support of the Petitioners' due process argument that the ISBA had unconstitutionally injected a personal financial interest into the proceeding. (Transcript at 663-668.) The Commissioner held that the evidence was inadmissible but agreed to preserve the ISBA's letter for the court's review. (Transcript at 668.) Additionally, over the Petitioners' objection, the ISBA presented expert testimony regarding what constitutes UPL.

On June 22, 2009, the Petitioners filed their Post-Trial Brief, again raising due process arguments, including vagueness, and contending that the ISBA had unconstitutionally injected a personal financial interest into the proceeding, as well as arguing that UFSC's business model was not UPL. (*See* UFSC Resp.'s Post-Trial Br., pp. 45-93 (argument on the merits), pp. 93-113 (constitutional arguments)). The Petitioners explained that the Commissioner refused to admit evidence regarding the ISBA's purported "settlement" offer into the record, and the Petitioners encouraged the court to request affidavits from counsel, so that the court could learn the amount of the payment that the ISBA orally proposed, since the amount was not memorialized in writing. (*Id.* at p. 100.) The Petitioners also explained that "[t]he ISBA has brought this action against UFSC and a laundry-list of individuals, despite the fact that some of these individuals had no involvement with any of the alleged UPL conduct," and urged that in the event that disgorgement was ordered, it should not be ordered against everyone. (*Id.* at p. 89 n.2.)

On July 13, 2009, the Commissioner issued his report. (App. 27-71.) Much of this report was a verbatim adoption of the ISBA's proposed findings. In the report, the Commissioner held that the Petitioners' arguments that the ISBA had injected a personal financial interest into the proceeding were baseless, despite the uncontested express language of the ISBA's "settlement" letter. (App. 62-63, ¶¶ 43-46.)

The Commissioner also held that the testimony presented by the ISBA's expert as to what constitutes UPL was "appropriate [and] helpful to the Commissioner." (App. 143, ¶ 262.)

On August 21, 2009, the Indiana Supreme Court requested supplemental briefing from the parties "for the purpose of arguing the conclusions of law that the Court should adopt from the findings of fact entered by the commissioner." The Petitioners reiterated in their supplemental brief that "the merits of this case should not be evaluated because this proceeding should be dismissed on due process grounds" and referred the Court to the portions of their Post-Trial Brief addressing these arguments.

On December 22, 2009, the Court heard oral argument on the limited issues of whether disgorgement of fees should be ordered and whether the Petitioners should be ordered to pay the attorney fees incurred by the ISBA. During oral argument, the Petitioners again raised their due process arguments, including vagueness, and contended that the ISBA had unconstitutionally injected a personal financial interest into the proceeding.

3. Indiana Supreme Court Decision

On April 14, 2010, the Indiana Supreme Court issued its opinion at *State of Ind. ex rel. Ind. State Bar Assoc. v. United Financial Systems Corp., et al.*, 926 N.E.2d 8 (Ind. 2010), holding that the Petitioners had engaged in UPL. (App. 14.) The court did not

explain what conduct violated the law, other than to state that "UFSC's business model has marginalized the attorney's role to such a degree as to cross the line of permissible practices." (App. 13-14.) The court enjoined the Petitioners from engaging in UPL; ordered the Petitioners to provide a copy of the opinion to all past customers; ordered the Petitioners to provide a refund to customers from June 6, 2006, through April 14, 2010, if the customers request a refund; ordered the Petitioners to pay a portion of the attorney fees incurred by the ISBA in relation to the Petitioners' argument that the ISBA had a financial interest in the proceeding; and ordered the Petitioners to pay costs and expenses to the ISBA. (App. 24-25.)

The costs and expenses that the Petitioners were ordered to pay included the ISBA's cost to present expert testimony during the fact-finding hearing, despite the Petitioners' objection to the expert testimony. (App. 18-19.) The court noted that the Commissioner found the expert testimony "instructive and helpful in making his findings." (App. 18.)

The court's opinion specified that all of the Petitioners were jointly and severally liable for the disgorgement of fees, for the costs of the proceeding, and for the portion of the ISBA's attorney fees that were awarded, even though the opinion did not make any findings of individual wrongdoing. (App. 25.)

With respect to the ISBA's purported "settlement" letter, the court's opinion stated:

> We agree with the Commissioner that these claims are without merit and that UFSC has "wrongly interpret[ed]" a letter of proposed settlement sent by ISBA's counsel, upon which UFSC based its assertion that the ISBA improperly was seeking a contribution as a condition of settlement. . . . Having reviewed the letter at issue, we conclude that the ISBA's reference to a "contribution," although undoubtedly a poor choice of words, was made "as a concept" within the context of addressing the remedies of disgorgement and attorney fees that the ISBA might request. . . . We do not read this letter as being indicative of any improper self-interest by the ISBA in bringing unauthorized practice actions under Rule 24.

(App. 17.)

REASONS FOR GRANTING THE PETITION

I. State Supreme Courts Cannot Constitutionally Order the Disgorgement of Fees For the Unauthorized Practice of Law, Unless Reasonable People Are On Notice As to What Conduct Is Prohibited

State rules prohibiting UPL have historically contained little or no specificity regarding what conduct was prohibited, in order to afford supreme courts

wide latitude in policing conduct. Indiana's UPL prohibition, which is found both in Indiana's criminal code and in Rule 24, is no exception. It states in relevant part that "[o]riginal actions . . . to restrain or enjoin the unauthorized practice of law . . . may be brought . . . by the attorney-general, the Indiana Supreme Court Disciplinary Commission, the Indiana State Bar Association or any duly authorized committee thereof." Ind. R. Admis. B. & Disc. Att'y 24. Rule 24 does not provide a definition of UPL and does not provide any guidance as to what conduct is prohibited. Instead, Indiana law defines UPL on a case-by-case basis, meaning that individuals may not be on notice that their conduct is prohibited until after UPL charges have been filed against them.

Traditionally, the remedy available against UPL offenders was an injunction. However, in recent years, the emerging trend among States has been to broaden UPL penalties to include a disgorgement of fees for past conduct. *See, i.e., State of Ind. ex rel. Indiana State Bar Assoc. v. Northouse*, 848 N.E.2d 668, 674 (Ind. 2006) (the remedies available for UPL include the disgorgement of fees for past conduct); *Cleveland Bar Assoc. v. Sharp Estate Services, Inc.*, 837 N.E.2d 1183, 1187-88 (Ohio 2005) (imposing a monetary penalty of $1,027,260.00 for UPL violations). Where States, like Indiana, do not limit how far back disgorgement can be sought, the prosecuting organization can seek disgorgement of all fees ever collected, dating back indefinitely.

As explained below, now that Indiana and other States have created indefinite disgorgement penalties, the lack of specificity regarding what conduct is prohibited raises serious due process concerns meriting this Court's attention. Otherwise, a substantial number of industries – including banking, real estate, social work, and insurance – may be chilled from providing services and information, which will ultimately harm the public and prevent the free-flow of speech and information.

A. Because Ordinary People Cannot Determine What Conduct Is Prohibited, Rule 24 Is Unconstitutionally Vague On Its Face

Indiana's Rule 24, like prohibitions in other States that fail to define what is prohibited, is unconstitutionally vague on its face and creates an impermissible chilling effect and risk of arbitrary enforcement. The Due Process Clause states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. V, XIV, § 1. This Court has explained that "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to what conduct it prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Vagueness may invalidate a law for either of two independent reasons: "First, it may fail to provide the kind of

notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Id.*

In other words, under the vagueness doctrine, penal statutes must define the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Gonzales v. Carhart*, 550 U.S. 124, 148-49 (2007). "[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." *City of Chicago*, 527 U.S. at 58. As this Court has explained,

> The dividing line between what is lawful and unlawful cannot be left to conjecture. . . . The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.

Connally v. General Constr. Co., 269 U.S. 385, 393 (1926) (quotations omitted). This requirement is "consonant alike with ordinary notions of fair play and the settled rules of law." *Id.* at 391.

Although the vagueness doctrine is generally applied to criminal statutes, it can apply to quasi-criminal or non-criminal statutes as well, particularly where the offense rests on the accused's speech. For example, in holding a state UPL statute unconstitutional as-applied, this Court explained that

> [i]t makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating . . . the existence of a penal statute susceptible of sweeping and improper application.

NAACP v. Button, 371 U.S. 415, 432-33 (1963). This Court also explained that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 439; *see Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499-500 (1982) (the same vagueness test applies to criminal and quasi-criminal ordinances); *Sedima v. Imrex Co.*, 473 U.S. 479, 492-93 (1985) ("to the extent an action . . . might be considered quasi-criminal, requiring protections normally applicable only to criminal proceedings, . . . the solution is to provide those protections").

The most important aspect of the vagueness doctrine is the requirement that minimal guidelines to govern enforcement be established. *Kolender v.*

Lawson, 461 U.S. 352, 358 (1983). For example, in *Coates v. Cincinnati*, 402 U.S. 611 (1971), this Court held that an ordinance prohibiting persons from assembling on a sidewalk and conducting themselves in a manner "annoying" to persons passing by was unconstitutionally vague. This Court explained that "[c]onduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Id.* at 614.

Similarly, in *City of Chicago*, this Court held that an ordinance prohibiting loitering was unconstitutionally vague. *City of Chicago*, 527 U.S. at 56-64. This Court explained that "the entire ordinance fail[ed] to give the ordinary citizen adequate notice of what was forbidden and what was permitted." *Id.* at 60. This Court also explained that "[t]he broad sweep of the ordinance . . . violate[d] the requirement that a legislature establish minimum guidelines to govern law enforcement." *Id.* at 60 (quotations omitted).

Likewise, here, because Indiana's Rule 24 does not specify what conduct is prohibited, it is unconstitutionally vague on its face. Rule 24 does not define what conduct is prohibited, instead merely providing a blanket prohibition of "the unauthorized practice of law." The blanket prohibition does not inform ordinary citizens what conduct will render them liable to its penalties. *See Connally*, 269 U.S. at 391 (the terms of a penal statute must "be sufficiently explicit to

inform those who are subject to it what conduct on their part will render them liable to its penalties"). Rather, Rule 24 leaves the dividing line between lawful and unlawful conduct to conjecture. *See id.* ("[t]he dividing line between what is lawful and unlawful cannot be left to conjecture"). Reasonable minds can differ as to what conduct constitutes UPL. Like the laws struck down in *Coates* and *City of Chicago*, Rule 24 is vague because no standard of conduct is specified at all. *See Coates*, 402 U.S. at 614; *City of Chicago*, 527 U.S. at 60.

In fact, even the Indiana Supreme Court has acknowledged that UPL does not have a settled legal meaning. *See State ex rel. Ind. State Bar Assoc. v. Ind. Real Estate Assoc.*, 191 N.E.2d 711, 714 (Ind. 1963) ("[t]here is a twilight zone between the area of activity which is clearly permitted to the layman, and that which is denied him [as UPL]"). Black's Law Dictionary defines UPL as "[t]he practice of law by a person, typically a nonlawyer, who has not been licensed or admitted to practice law in a given jurisdiction," and then goes on to state:

> The ***definitions and tests employed*** by courts to delineate unauthorized practice by non-lawyers ***have been vague or conclusory, while jurisdictions have differed significantly*** in describing what constitutes unauthorized practice in particular areas. Certain activities, such as the representation of another person in litigation, are generally proscribed. Even in that area, many jurisdictions recognize exceptions for such

matters as small-claims and landlord-tenant tribunals and certain proceedings in administrative agencies. . . . ***Controversy has surrounded many out-of-court activities such as advising on estate planning by bank trust officers, advising on estate planning by insurance agents, stock brokers, or benefit-plan and similar consultants,*** filling out or providing guidance on forms for property transactions by real estate agents, title companies, and closing-service companies, and selling books or individual forms containing instructions on self-help legal services or accompanied by personal, non-lawyer assistance on filling them out in connection with legal procedures such as obtaining a marriage dissolution. . . . ***Several jurisdictions recognize that many such services can be provided by non-lawyers without significant risk of incompetent service,*** that actual experience in several states with extensive non-lawyer provision of traditional legal services indicates no significant risk of harm to consumers of such services, that persons in need of legal services may be significantly aided in obtaining assistance at a much lower price than would be entailed by segregating out a portion of a transaction to be handled by a lawyer for a fee, and ***that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services***. In addition, traditional

> common-law and statutory consumer protection measures offer significant protection to consumers of such non-lawyer services.

Black's Law Dictionary (7th ed.) (quotations omitted) (emphases added).

In other words, there is no uniform or common-sense test for determining whether particular conduct constitutes UPL, and even legal dictionaries cannot produce a uniform definition. UPL has so many multiple meanings that unless a State sets forth what conduct is prohibited, a citizen may act upon one conception of the law's requirements and the courts may act upon another.

As a result, numerous States have provided definitions by rule or statute as to what conduct constitutes UPL. *See, i.e.*, Ala. Code § 34-3-6; Ariz. Sup. Ct. R. 31(a)-(d); D.C. Ct. App. R. 49(b)(2); La. Rev. Stat. § 37:212; Miss. Code Ann. § 73-3-55; Tenn. Code Ann. § 23-3-101; Wash. GR 24; W. Va. Code § 30-2-5. Montana law even provides a licensing procedure by which non-attorneys can register to sell living trusts without running afoul to Montana's UPL prohibition. Mont. Code § 30-10-904; Montana Commissioner of Securities and Insurance, http://www.sao.mt.gov/securities/secintro.asp#LT. There is no reason why Indiana could not define what conduct is prohibited by Rule 24, like other States have done. Alternatively, the court should not impose monetary sanctions unless prior decisions clearly prohibit the conduct at issue. As the Iowa Supreme Court has explained:

> Until this court speaks, generally it is not clear what constitutes the practice of law in a particular set of circumstances. . . . Because of the marked lack of precision in the definition of unauthorized practice, it would be intolerable to hold [the accused] to a prophet's standard of clairvoyance about unclear areas of practice in a jurisdiction.

The Committee on Prof. Ethics & Conduct of the Iowa State Bar Assoc. v. Baker, 492 N.W.2d 695 (Iowa 1992).

The present case illustrates that lawyers and nonlawyers alike are incapable of determining what conduct is prohibited by Rule 24. Here, the Petitioners believed that UFSC's business practices were in compliance with Rule 24 because UFSC referred customers to an attorney; the attorney advised the individual which estate plan, if any, was best for him; and then the attorney drafted the estate plan. UFSC even sought advice from knowledgeable and reputable Attorney Hodes to ensure that its business practices were within the confines of the law. UFSC was advised that its practices were lawful. When knowledgeable attorneys, such as Attorney Hodes, are unable to predict accurately what conduct is prohibited, laymen surely should not be expected to make such predictions.

If Rule 24 had delineated what conduct was prohibited, the Petitioners could have taken the necessary steps to ensure compliance with the Rule. However, because Rule 24 does not specify what is

prohibited, the Petitioners, and their legal counsel, were unaware that the Petitioner's conduct could constitute a violation and were thus unable to conform their conduct. The Petitioners could not intelligently choose in advance what course was lawful for them to pursue. *See Connally*, 269 U.S. at 393 ("[t]he crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue"). As a result, the Petitioners have been found guilty of violations and will be deprived of the fees that UFSC has collected.

Even the Commissioner in this case found it necessary to hear expert testimony as to what constitutes UPL in reaching his findings. (App. 52, ¶ 27 (stating the expert testimony was "instructive")). Apparently agreeing that expert testimony assists in determining whether UPL has occurred, the Indiana Supreme Court ordered the Petitioners to bear the expense of the ISBA's expert. (App. 18-19.) Where officers of the court require expert testimony to determine whether an offense has been committed, it certainly suggests that the elements of the offense have not been defined such that a reasonable person would be on notice what conduct is prohibited.

The Indiana Supreme Court's statement that it has "not attempted to provide a comprehensive definition of what constitutes the practice of law because of the infinite variety of fact situations which must each be judged according to its own specific circumstances," *Miller v. Vance*, 463 N.E.2d 250, 251 (Ind.

1984), is constitutionally infirm in light of the substantial penalties available against individuals. The court's statement inherently preserves its ability to punish defendants for conduct that it did not previously think to prohibit. Due process does not permit States to deprive individuals of property without fair-warning. *See NAACP v. Button*, 371 U.S. at 439 ("a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights"). If the court wants to define what conduct is prohibited on a case-by-case basis, then it should only levy monetary sanctions after the conduct has been prohibited by a prior case. The court cannot simultaneously define the conduct as prohibited and impose sanctions for the conduct, without running afoul of the due process clause.

Furthermore, the legislative branch must frequently draft hard-to-define offenses. If the Legislature created an offense labeled "unauthorized conduct," and then refused to define it because of the infinite variety of fact situations that could be "unauthorized," the courts would strike the law as unconstitutional. State supreme courts should be held to the same standard. If UPL is too difficult for the judiciary to define, then it is certainly too difficult for nonlawyers to recognize. Where lawyers and judges have difficulty determining what conduct is prohibited, nonlawyers do not stand a chance at interpreting and complying with Rule 24.

Moreover, the Rule's failure to define what conduct is prohibited encourages arbitrary and discriminatory enforcement, particularly since enforcement actions can be brought by the ISBA, which has a self-interest in preventing non-lawyers from competing with lawyers. The risk of arbitrary enforcement is heightened because the Rule does not contain a statute of limitations, meaning that enforcement actions may relate to conduct that occurred decades ago. Accordingly, this Court should accept certiorari, because it is the only means of preventing States from invading individuals' due process rights, and of preventing the inevitable chilling effect that will occur among industries that touch-upon legal topics or involve referring individuals to attorneys. *See NAACP v. Button*, 371 U.S. 415, 433 (1963) (UPL statute was unconstitutional because the "threat of sanctions" may deter conduct "almost as potently as the actual application of sanctions").

B. Because the Petitioners Were Not On Notice That Their Conduct Was Prohibited, Rule 24 Is Unconstitutionally Vague As-Applied

Additionally, because there was no Indiana precedent prohibiting the conduct at issue here, Rule 24 is unconstitutional as-applied. Prior to this case, the only guidance that Indiana law provided as to what conduct was prohibited in the estate planning context was that non-attorneys "preparing and drafting a will and giving advice as to the contents and

legal effect of a will constitute the practice of law." *Northouse*, 848 N.E.2d at 672. There was no Indiana case law regarding the role that non-attorney representatives could play in the marketing of estate planning assistance services, where all individuals were referred to Indiana attorneys and all estate plans were drafted by licensed Indiana attorneys on a case-by-case basis. The Petitioners were not on notice that they could violate Rule 24 if each estate plan was drafted, prepared, and reviewed by an independent contractor Indiana attorney on a case-by-case basis.

In fact, in *Cincinnati Ins. Co.*, the Indiana Supreme Court held that insurance companies did not commit UPL when their employee-attorneys represent the company's insureds because "agency doctrine permits an unlicensed legal entity to employ licensed agents to perform those acts requiring a license." *Cincinnati Ins. Co.*, 717 N.E.2d at 160. The court further explained that "the lawfulness of the entity's activities turns on whether the individual is properly licensed." *Id.*

Like the third-party payor arrangements that the Indiana Supreme Court approved in *Cincinnati Ins. Co.*, the Petitioners believed that UFSC had essentially established a third-party payor arrangement for its customers wherein UFSC obtained the customer's express authorization to refer the customer to an attorney and to pay the attorney on the customer's behalf for providing legal advice and drafting estate planning documents for the customer. Where insurance companies do not practice law by hiring an

attorney on a customer's behalf and compensating the attorney out of funds paid by the customer, the Petitioners likewise believed that UFSC was not practicing law by referring customers to an attorney and compensating the attorney on the customer's behalf. *See Cincinnati Ins. Co.*, 717 N.E.2d at 160 ("agency doctrine permits an unlicensed legal entity to employ licensed agents to perform those acts requiring a license," including legal services); *Charter One v. Condra*, 865 N.E.2d 602, 606 (Ind. 2007). ("payment of compensation does not convert an otherwise proper activity by a layperson into the practice of law"). As a result, the Petitioners were not on notice that their conduct was prohibited.

Indeed, UFSC's third-party payor system seemed superior to that of most insurance company models, because insurance companies typically maintain control over the attorney-client interaction through cooperation clauses in its customers' contracts. UFSC, in contrast, did not maintain control over the attorney-client relationship that the customer and the attorney formed, leading the Petitioners to believe that UFSC's business model was lawful.

Furthermore, the Petitioners believed that UFSC's non-attorney representatives were within the bounds of the law because the management of an individual's affairs was not left totally in the hands of a non-attorney, but was instead left in the hands of a licensed Indiana attorney. *See In re Perrello*, 368 N.E.2d 174, 179 (Ind. 1979) ("[t]he core element of practicing law is . . . placing of oneself in the very

sensitive relationship wherein the confidence of the client, and the management of his affairs, is left ***totally*** in the hands of the attorney") (emphasis added). Moreover, by referring individuals to attorneys for estate planning advice and services, it seemed that the non-attorney representatives in UFSC's business model were acting on matters of general knowledge, not practicing law. *See Charter One*, 865 N.E.2d at 606-07 ("[d]irecting or acting on matters of general knowledge, even if knowledge of a rule of law, does not constitute the practice of law" and "payment of compensation does not convert an otherwise proper activity by a layperson into the practice of law").

Additionally, precedent from this Court suggested that UFSC's business model was lawful. In *NAAC v. Button*, the Virginia Supreme Court found the NAACP guilty of UPL for contacting prospective litigants and recommending that they seek the assistance of attorneys that the NAACP employed. This Court held that the NAACP's practices could not be enjoined as UPL, because those activities were protected by the First and Fourteenth Amendments. *NAACP v. Button*, 371 U.S. at 428-29.

Similarly, in *Brotherhood of Railroad Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1 (1964), the Brotherhood had a practice of advising injured members and their dependents to obtain legal advice before settling their claims, and of advising the injured members and dependents that the Brotherhood recommended particular attorneys to handle such

claims. The Virginia Supreme Court enjoined the Brotherhood's practice as UPL, finding that this practice resulted in channeling all, or substantially all, workers' claims to attorneys chosen by the Brotherhood. *Brotherhood of Railroad Trainmen*, 377 U.S. at 2. This Court held that the Brotherhood could not be enjoined from channeling legal employment to the particular attorneys approved by the Brotherhood, because their practices were protected by the First and Fourteenth Amendments. *Id.* at 5-7. This Court explained that "[t]he railroad workers, by recommending competent lawyers to each other, obviously are not themselves engaging in the practice of law, nor are they or the lawyers whom they select parties to any soliciting of bu iness." *Id.* at 6-7.

The facts of this case are similar to the facts in *NAACP v. Button* and *Brotherhood of Railroad Trainmen* because, like the organizations in those cases, UFSC was recommending that individuals who might have a need for legal services may want to seek legal advice and services from particular attorneys. *See also United Mine Workers of America v. Illinois State Bar Assoc.*, 389 U.S. 217, 221-22 (1967) ("the *First* and *Fourteenth Amendments* gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights"). This model seemed lawful, because UFSC, by recommending competent lawyers, did not believe that it was engaging in the practice of law. Rather, the licensed Indiana attorneys that UFSC's customers were referred to engaged in the practice of law.

Although UFSC stood to gain financially in certain respects, the Indiana Supreme Court had previously explained that "payment of compensation does not convert an otherwise proper activity by a layperson into the practice of law." *Charter One*, 865 N.E.2d at 606.

Indiana's lack of case law prohibiting the practice of referring customers to specific attorneys resulted in a lack of notice to the Petitioners that their conduct was unlawful, particularly when coupled with case law from this Court suggesting that organizations can lawfully recommend specific attorneys to individuals who may be in need of legal services. *See United Transportation Union v. State Bar of Mich.*, 401 U.S. 576, 582-84 (1971) (union could not be enjoined from assisting its members in finding attorneys at reduced fees by securing an agreement from recommended counsel that recovery will not exceed a certain percentage and by transporting injured members to the attorney's office).

Despite the Petitioners' lack of notice that UFSC's business model was prohibited, the Indiana Supreme Court did not address the vagueness concerns raised by the Petitioners during the proceeding below, other than to state that a prior Indiana case, *State of Ind. ex rel. Ind. State Bar Assoc. v. Northouse*, 848 N.E.2d 668 (Ind. 2006), "should have put UFSC on clear notice that its practices were unlawful." (App. 22.) Yet, *Northouse* provides no guidance regarding the facts of this case.

In *Northouse*, non-attorneys were found guilty of UPL for reviewing and discussing clients' previous estate plans, drafting testamentary and trust documents, and advising the clients as to the estate plans' legal effect, ***without any attorney review or involvement***. *Northouse*, 848 N.E.2d at 673. In contrast, here, all legal documents that UFSC's customers received were drafted by licensed Indiana attorneys after the attorney contacted the individual and assessed the individual's needs using his or her independent professional judgment. Reasonable persons could believe that the meaningful involvement of attorneys is a crucial distinction between the facts of this case and *Northouse*. Thus, *Northouse* did not make clear that UFSC's business model was prohibited.

In fact, even in the Indiana Supreme Court's opinion finding that the Petitioners engaged in UPL, the court fails to explain what conduct by the Petitioners violated the law, other than to say that "UFSC's business model has marginalized the attorney's role to such a degree as to cross the line of permissible practices." (App. 13-14.) In other words, the court has still failed to articulate a standard by which reasonable persons could judge whether their conduct complies with Indiana's UPL prohibition. Even after being found guilty of UPL, the Petitioners are still unable to ascertain what conduct subjected them to liability or what conduct will subject them to liability in the future.

If Indiana wishes to prohibit business models wherein a corporation refers individuals to specific attorneys for their estate planning needs, it could follow the District of Columbia's approach by adopting a rule defining UPL as "[p]reparing any legal document, including . . . any instruments intended to affect the disposition of property of decedents' estates . . . [or] furnishing an attorney or attorneys . . . to render [this] service[ ]." D.C. Ct. App. R. 49(b)(2)(A), (F); *see* W. Va. Code § 30-2-5 ("it shall be unlawful for any corporation . . . to furnish an attorney or counsel to render legal services of any kind"). Instead, Indiana has repeatedly failed to define what conduct is prohibited and has taken the inconsistent approach of first holding that insurance companies can furnish attorneys for customers' legal needs, but then holding in this case that the Petitioners had unlawfully "marginalized" the attorney's role by referring individuals to specific attorneys for their estate planning needs.

Due process requires more notice than was provided to the Petitioners in this case before the imposition of monetary sanctions. Accordingly, this Court should accept certiorari and clarify that monetary sanctions cannot constitutionally be imposed for UPL violations where offenders were not previously on notice that the conduct at issue was prohibited.

II. The Indiana Supreme Court Violated the Petitioners' Due Process Rights By Allowing the ISBA To Prosecute the Case, Even After the ISBA Offered To Lower the Charges Against the Petitioners In Exchange For a Substantial Direct Monetary Payment To the ISBA

The Petitioners' due process rights were also violated when the ISBA – the prosecutor in this case – injected a personal financial interest in the proceeding by requesting a substantial monetary payment in exchange for lowering the charges. Due process encompasses a requirement of neutrality in adjudicative proceedings. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). This neutrality requirement "has been jealously guarded" by this Court because it "helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Id.*

Although this neutrality requirement typically arises in the context of judges, "[p]rosecutors are also public officials[, and] they too must serve the public interest." *Id.* at 249; *see Adkins v. Commonwealth*, 492 S.E.2d 833, 835 (Va. Ct. App. 1997) ("[p]ublic prosecutor is vested with a duty not merely to convict, but to see that accused receives fair and impartial trial"). "[T]raditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." *Marshall*, 446 U.S. at 249. Because "[a]

scheme injecting a personal interest . . . into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision[,]" such a scheme may "raise serious constitutional questions." *Id.* at 249-50.

If a prosecutor is "subject to influences that undermine confidence that a prosecution can be conducted in disinterested fashion," this Court "cannot have confidence in a proceeding in which this officer plays the critical role of preparing and presenting the case for the defendant's guilt." *Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787, 811 (1987); *see Adkins*, 492 S.E.2d at 835 (where a prosecutor has a "personal interest in the outcome of the prosecution, his objectivity and impartiality are called into question and a defendant's right to a fair and impartial trial is violated") (citations and quotations omitted). When the lack of neutrality is based on a financial interest in the proceeding, even a minimal financial interest violates the due process clause. *See Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927) (holding that the defendant's due process rights were violated even though the adjudicator would have gained only $12 from the proceeding).

Recently, in the context of judicial neutrality, this Court explained that "the *Due Process Clause* has been implemented by objective standards that do not require proof of actual bias." *Caperton v. Massey Coal Co.*, 129 S. Ct. 2252, 2263 (2009). In defining these due process standards, this Court asked whether,

"under a realistic appraisal of psychological tendencies and human weakness, [an adjudicator's] interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* (quotations omitted). Consistent with this reasoning, a defendant is not required to show that his prosecutor was ***actually*** biased in order to prove that his due process rights were violated by the prosecutor's interest in the proceeding. Rather, due process is violated whenever the prosecutor creates "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process." *Marshall*, 446 U.S. at 249-50; *see Young*, 481 U.S. at 811-12 ("[j]ustice must satisfy the appearance of justice . . . and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite").

In *Caperton*, this Court held that a judge's receipt of campaign contributions from an opposing party violated the other litigant's due process rights, even though there was no evidence that the judge would offer a quid pro quo favor in return. *Caperton*, 129 S. Ct. at 2265. Here, there is direct evidence that the ISBA ***did offer*** a quid pro quo arrangement, in which the ISBA would receive a substantial monetary payment. The ISBA's letter stated that the Petitioners "might wish to explore . . . the prospect of a contribution to the [ISBA] which is reflective of the amount the company and principals risk losing via disgorgement." The letter stated that "[i]n exchange, the [ISBA] may agree not to seek disgorgement on any

plan beyond the two (2) year period which [the Petitioners] have asserted as legitimately at issue." The letter added that "[t]he ***funds contributed*** to the [ISBA] ***could*** be designated for use by the Board of Governors and/or the Unauthorized Practice of Law Committee to use in the education of the public on this topic, enforcement of UPL ***or otherwise as the Board would deem appropriate***." (emphases added). The terms of this letter are clear – the ISBA was proposing to lower the charges against the Petitioners if the Petitioners would pay a substantial amount of money to the ISBA.

Although the Indiana Supreme Court held that the Petitioners "wrongly interpret[ed]" the ISBA's letter and that "the ISBA's reference to a 'contribution,' although undoubtedly a poor choice of words, was made '***as a concept***' within the context of addressing the remedies of disgorgement and attorney fees that the ISBA might request," (app. 17 (emphasis added)), the court failed to explain how labeling the ISBA's offer as "a concept" remedied the due process violation. Indeed, any proposal by a prosecutor to lower charges against a defendant in exchange for a substantial monetary payment could be labeled "a concept," yet such conduct is clearly violative of due process. *See Brotherhood of Railroad Trainmen*, 377 U.S. at 6 ("in regulating the practice of law a State cannot ignore the rights of individuals . . . a State cannot foreclose the exercise of constitutional rights by mere labels").

Furthermore, the court's conclusion that the Petitioners "wrongly interpret[ed]" the letter is inconsistent with the fact that the ISBA never denied having requested a monetary payment from the Petitioners. Moreover, the record does not indicate any steps taken by the court to ascertain that the ISBA had an intent other than to receive a monetary payment from the Petitioners, and the record does not reflect any inquiry by the court as to the amount of the monetary payment that the ISBA requested, despite recommendation by counsel for the Petitioners that such an inquiry should be made.

The undisputed language of the letter indicates that the ISBA attempted to receive a monetary benefit from this case, and, in doing so, injected a personal financial interest into this proceeding. Despite this financial interest, the ISBA played the critical role of preparing and presenting the case for the Petitioners' guilt. As a result, this Court cannot have confidence in the propriety of the proceeding. The risk that improper motives entered into the prosecutorial decision-making process is sufficiently substantial that this practice must be forbidden if the guarantee of due process is to be adequately implemented. *See Young*, 481 U.S. at 812 (declining to analyze whether a prosecutor's interest was harmless-error because "such analysis would not be sensitive to the fundamental nature of the error committed").

Indeed, it appears that the ISBA's influence in this case was substantial, since the Commissioner's

eighty-seven (87) page fact-finding Report was a virtual verbatim adoption of the ISBA's proposed findings. Accordingly, this Court should accept certiorari in this case and clarify that prosecutors, regardless of whether that prosecutor is employed by the State or is a private organization statutorily authorized to bring charges on behalf of the State, cannot offer to lower charges against defendants in exchange for direct monetary payments.

III. The Indiana Supreme Court Violated the Individual Petitioners' Due Process Rights By Holding Them Jointly and Severally Liable For the Disgorgement of Fees and Payment of Costs Without Any Findings of Individual Misconduct or Control Over the Corporation

The Indiana Supreme Court also violated the individual Petitioners' due process rights by holding them jointly and severally liable for the disgorgement of fees and the payment of the ISBA's costs in prosecuting the proceeding, despite the absence of any findings of individual misconduct or control over the corporation. Although this Court has had little opportunity to address what level of individual culpability must be charged and proved in order for monetary sanctions to be jointly and severally imposed upon individuals, the imposition of such liability absent ***any*** findings of individual misconduct or explanation as to why liability was imposed is contrary to notions of fair play and substantial

justice. As this Court has recognized, "guilt by association is a philosophy alien to the traditions of a free society." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982) (reversing an order that everyone who took part in a boycott was jointly and severally liable for the damages arising from that boycott because guilt by association was insufficient to support a judgment of liability); *see Rizzo v. Goode*, 432 U.S. 362, 366-81 (1976) (vacating an injunction directed against an entire police department that had resulted from 20 specific incidents of police misconduct and finding that collective responsibility should not have been imposed).

Here, the lack of evidence regarding any individual responsibility by the Petitioners demonstrates that the Petitioners were found guilty merely as a result of their association with UFSC. Rule 24 requires UPL Petitions to "charge ***specifically the acts*** constituting the unauthorized practice of law." Ind. R. Admis. B. & Disc. Att'y 24 (emphasis added). Such a requirement is consistent with due process protections, since an accused must know what he is charged with before he can prepare an adequate defense. Nonetheless, the ISBA failed to identify any specific acts of UPL conduct allegedly engaged in by several of the Petitioners in its Petition. Likewise, at the fact-finding hearing, the ISBA failed to present evidence of specific acts of UPL conduct engaged in by several of the Petitioners. The ISBA also failed to present evidence that several of the Petitioners had any ownership interest in UFSC, or any control over

the operation or business model of UFSC. The ISBA did not present evidence that any of the Petitioners had pierced the corporate veil of UFSC.

Yet, in its proposed findings of fact, the ISBA urged the court to impose liability for "any monetary penalties or obligations" personally upon individual Petitioners, "in order to better insure compliance and so they are not avoided through the use of the layers of corporate structure that have been put in place and avoidance of personal liability through the use of that structure." (ISBA's Proposed Findings, pp. 78-79, ¶ 253.) The Commissioner adopted this proposed finding verbatim. (App. 142-43, ¶ 261.)

In its opinion, the Indiana Supreme Court ordered that all of the Petitioners were jointly and severally liable for disgorgement of fees collected by UFSC and the costs and attorney fees ordered to the ISBA. (App. 25.) The opinion did not address the basis upon which joint and several liability was ordered. The opinion did not make any findings regarding whether the individual Petitioners had personally engaged in misconduct, or whether the individual Petitioners had an ownership interest in UFSC or had control over the operations or business model of UFSC. In fact, the only sentence contained in the opinion regarding the ownership or control of UFSC was that "[t]he principals of the company and the various entities comprising its corporate structure are members of the Follett family." (App. at 4.) The court did not address any ownership or control of UFSC by anyone outside the Follet family. The court

did not address whether UFSC's corporate veil had been pierced, or provide any other analysis as to why the individual Petitioners, principals of UFSC or otherwise, should be personally liable for the monetary sanctions. Rather, the court merely ordered joint and several liability without explanation and without any individual findings of misconduct. (App. 25.)

The order in this case amounts to an order of guilt by association, which is inimical to due process. An entire laundry-list of individuals was tried and convicted together after a three-day fact-finding hearing before a Commissioner, and they now have personal liability for what could be millions of dollars, despite a lack of evidence in the record that the individual Petitioners ever received any portion of the fees collected by UFSC that they are now liable for refunding.

Due process dictates that the State bears the burden of proof to show evidence of the Petitioner's guilt, yet the court's order effectively removed this burden from the State by allowing a conviction absent such evidence. The lack of proof of misconduct in this case is particularly egregious given, as discussed above, the lack of specificity in the law regarding what conduct was prohibited and the prosecutor's request for a monetary payment from the Petitioners.

The fact that individuals can be convicted of UPL without evidence of individual misconduct is also particularly disturbing because of the absence of procedural protections in place for UPL proceedings.

There is no right to a jury trial. Individual petitioners are not given the option of separate trials. Individual petitioners are given little if any opportunity to conduct discovery. Unlike criminal proceedings, the prosecutor is under no obligation to disclose evidence suggesting that the accused is innocent, and the accused is generally not permitted to file any pleadings other than a return to the petition. *See* Ind. R. Admis. B. & Disc. Att'y 24 ("Within time allowed, a respondent may file a verified return showing any reason in law or fact why an injunction should not issue. No other pleading in behalf of a respondent will be entertained."). This lack of procedure, as well as the conviction in this case absent evidence of individual misconduct, demonstrates that due process is not being provided to individuals who are accused of UPL. This Court's grant of certiorari is necessary to prevent States from imposing substantial monetary sanctions against individuals without affording them even the basic procedural safeguards required by the United States Constitution and due process.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court GRANT this petition and issue a writ of certiorari.

Respectfully submitted,

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In the Indiana Supreme Court

No. 94S00-0810-MS-551

STATE OF INDIANA EX REL.
INDIANA STATE BAR ASSOCIATION,

Relator,

v.

UNITED FINANCIAL SYSTEMS CORPORATION,
RICHARD FOLLETT, JAYNE A. FOLLETT,
RICHARD L. FOLLETT II, BEAU R. FOLLETT,
JODY WAUGH, RAYMOND C. PHILLIPS,
LINDA DISHONG, L. KAY LARSEN, JOHN JOYCE,
GARY LOVELADY, SHARON DORSEY, SHERRY JORDAN,
DOUGLAS J. LALAMA, ANDREW MARK EADS,
KATIE JACKEL, AND JAMES BOYLES,

Respondents.

App. 2

On Petition to Enjoin the
Unauthorized Practice of Law

April 14, 2010

Per Curiam.

This is an original action brought by the Indiana State Bar Association ("ISBA") in the name of the State of Indiana pursuant to Indiana Admission and Discipline Rule 24, alleging that United Financial Systems Corporation and numerous individual respondents (collectively, "UFSC")[1] have engaged in the unauthorized practice of law in Indiana. The ISBA seeks an order (1) enjoining UFSC from the unauthorized practice of law, (2) requiring UFSC to disgorge fees collected for unauthorized legal services, and (3) compelling UFSC to pay various fees, costs and expenses, including reasonable attorney fees.

This Court has exclusive jurisdiction over matters involving the unauthorized practice of law. *See* Ind. Const. art. 7, § 4; *see also* Ind.Code § 33-24-1-2. As set forth in more detail below, we find that UFSC has engaged in the unauthorized practice of law and that an injunction prohibiting such conduct

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[1] The ISBA entered into settlement agreements with respondents Douglas Lalama, Linda Dishong, Kay Larsen, Katie Jackel and Andrew Eads, who agreed to a permanent injunction. We approved the agreements and those particular respondents were dismissed from this action. Our opinion today is directed toward the remaining respondents.

should issue. Although the phrase "costs and expenses" under Rule 24 does not include attorney fees, the ISBA nevertheless is entitled to certain statutory attorney fees. Finally, disgorgement of fees is warranted to the extent described below.

I. Procedural Background

On October 9, 2008, the ISBA filed a verified petition alleging that UFSC engaged in the unauthorized practice of law. After verified returns were filed by several respondents, the Honorable Bruce C. Embrey was appointed by agreement of the parties to act as Commissioner to hear the evidence and provide the Court with findings of fact. Following an evidentiary hearing spanning three days and the submission of briefing and proposed findings by the parties, Judge Embrey issued his Report of the Commissioner ("Report") on July 13, 2009. We commend Judge Embrey for the thoroughness of his Report, which has greatly aided us in the exercise of our original jurisdiction.

The Court received further briefing from the parties and from the Disciplinary Commission, which was granted leave to appear as *amicus curiae*. Oral argument then was heard on the issues of disgorgement and attorney fees.

II. Findings of Fact[2]

A. UFSC's business model

UFSC is an insurance marketing agency. The principals of the company and the various entities comprising its corporate structure are members of the Follett family. In 1995, UFSC began to market and sell estate planning services, including wills and trusts. The company is headquartered in Indianapolis and does business in Indiana and twelve other states. In Indiana, from October 2006 through May 2009, UFSC sold 1,306 estate plans from which the company grossed over $2.7 million. (Report at 2-3, ¶ 1.) During roughly this same period of time, 0.09% of UFSC's total nationwide income and 18.8% of UFSC's nationwide fee income was derived from the sale of estate planning services in Indiana. (*Id.* at 2.)

The business practices at issue in this case occurred as follows. UFSC targeted and then mailed prospective clients (generally retirees) information on how to avoid probate. For those who responded, as well as some existing UFSC clients, a UFSC sales

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[2] UFSC disputes several findings of fact made by the Commissioner. In our order scheduling briefing in this matter, the parties were advised that the Commissioner's findings would be reversed only if found to be clearly erroneous. *See GKN Co. v. Magness*, 744 N.E.2d 397, 401 (Ind. 2001) (indicating that where a trial court conducts an evidentiary hearing, we give its factual findings deference and reverse only if the findings are clearly erroneous). Having reviewed the record, we find ample support for the material findings of fact challenged by UFSC, and do not address UFSC's factual disputes individually.

representative (either an Estate Planning Assistant or a Health Planning Assistant) met with the client and gained access to his or her financial information, which the company separately used later in an effort by its Financial Planning Assistants to sell insurance products. The presentation made by the Estate Planning Assistant or the Health Planning Assistant to the prospective client touted UFSC's team of tax strategists, financial consultants, independent attorneys, and Medicaid and estate planning assistants. In reality, UFSC has no tax strategists. (Report at 3-4, ¶¶ 3-7.)

The Estate Planning Assistant or Health Planning Assistant received a commission on sales of wills and trusts, and the Assistant's presentations pushed the most expensive plan. The cost of this plan, which included a will, trust, powers of attorney, deeds, and the promise of future amendments as needed, was $2,695 in 2009. The commission from each sale of this plan ranged from $750 to $900. (Report at 38, ¶¶ 91-92.) The Estate Planning Assistants and Health Planning Assistants were not licensed attorneys and were not directly supervised by an attorney. The Financial Planning Assistants likewise were not attorneys. (Report at 5, 21, 36, ¶¶ 9, 30, 85.)

Once a sale was made, the Estate Planning Assistant or Health Planning Assistant secured full or

partial payment from the client on the spot.[3] The forms containing the client's personal and financial information were routed to UFSC's in-house counsel, David McInerney, who then provided the information to one of the panel attorneys with whom UFSC has contracted. The estate plans sold by UFSC throughout the country were all processed in Indianapolis and routed to panel attorneys in Indiana and other states to draft documents for the plans. (Report at 5, 40, ¶¶ 10, 97.)

Upon receiving a client's information, the panel attorney called the client, knowing the client had already paid for a certain estate plan. (Report at 5-6, ¶ 11.) UFSC insists that the panel attorneys had the freedom to exercise their own independent judgment in ensuring that the client had an estate plan suitable for his or her interests. Notably though, of the 1,306 estate plans sold in Indiana from October 2006 to May 2009, only nine of these clients downgraded to a less expensive plan following consultation with a panel attorney. Further, because a panel attorney was paid a flat fee of only $225 for drafting the estate planning documents, any consultation between the

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[3] UFSC's training materials instruct the Estate Planning Assistants and Health Planning Assistants how to overcome clients' objections to immediate payment, such as apprehensiveness about the cost, requests to "think it over" or "discuss this with my children," or a desire to consult with a lawyer (which the training materials characterize as "by far the most frustrating objection"). (Report at 39, ¶ 96; ISBA Exh. 8, pp. 1609-21.)

panel attorney and the client above and beyond the initial phone call generally was not financially feasible. (Report at 6, ¶¶ 12-13.)

The documents prepared by the panel attorney were then sent back to UFSC and bound. A Financial Planning Assistant was paid $75 to deliver the documents and assist the client in executing them. The Financial Planning Assistant, who was compensated primarily through commissions from the sale of insurance products, then endeavored to sell the client insurance products based on the financial information provided by the client. UFSC imposed sales quotas on its Financial Planning Assistants, who were expected to generate a weekly average of at least $75,000 in annuity or life premium sales. (Report at 7, ¶¶ 15-16.)

UFSC has structured its business such that the Estate Planning Assistants, Health Planning Assistants, Financial Planning Assistants and the panel attorneys are considered by UFSC to be independent contractors. (Report at 3-4, ¶ 5.) However, all of these persons are essential to UFSC's core business model. UFSC loses money on the sales made by the Estate Planning Assistants and Health Planning Assistants, because the cost of developing leads exceeds the profits from those sales alone. Instead, UFSC's profits are generated by the sale of annuities and other insurance products, which often are used to fund the trusts. (Report at 40, ¶ 99.)

B. Other relevant facts

Notwithstanding UFSC's protestations that the panel attorneys exercised independent professional judgment in counseling clients regarding their estate planning needs, several factors call into question the attorneys' ability and motivation to do so within the business model employed by UFSC. While no one factor necessarily is dispositive, they collectively present a troubling picture.[4]

The disparity of fees earned, between the Estate Planning Assistants and Health Planning Assistants on the one hand (between $750 and $900 per sale of the most expensive estate plan package) and the panel attorneys on the other hand ($225 for drafting the documents and consulting with the client by phone), is indicative of an emphasis on sales and revenue rather than the provision of objective, disinterested legal advice. So too is the fact that an estate plan is sold to the client prior to any attorney involvement whatsoever. Similarly, that UFSC's profitability stems from the sale of insurance products related to the trusts created by the estate plans and the financial information and "leads" obtained by the Estate Planning Assistants and Health Planning

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[4] Evidence was received by the Commissioner to the effect that UFSC made slight adjustments to its business model in Indiana in 2009. For the reasons set forth by the Commissioner, we do not believe that these slight adjustments are sufficient to correct the deficiencies addressed in this opinion. (*See* Report at 49-51, ¶ 132.)

Assistants tends to emphasize sales and revenue over objective, disinterested legal advice.

The testimony of various panel attorneys reveals minimal independent consultation with clients and heavy reliance on the communications between the client and the company's salesperson. One panel attorney testified the bulk of his legal practice was dependent on UFSC client referrals, and another panel attorney estimated that at least 85% of clients referred to him ordered the most expensive trust package as opposed to a simple will package. (Report at 42, 43, ¶¶ 102, 108; ISBA Exh. 10; Tr. at 692.) Several panel attorneys utilized standardized estate planning documents and forms that had been prepared and provided by UFSC,[5] and the letters sent by the panel attorneys to the Financial Planning Assistants regarding the execution of the estate planning instruments also were prepared by UFSC. (Report at 43-45, ¶¶ 112-13; Tr. at 681-83.) Explanation to the client of the relevance and purposes of the documents being executed typically was delegated to the Financial Planning Assistants. (Report at 45, ¶ 116.)

The experiences of particular UFSC clients, as reflected in the evidentiary record, also tend to

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[5] These standardized documents often contained clauses inapplicable to the client, such as provisions for distribution to children for a client who never had children and community property provisions inapplicable in Indiana. (Report at 6, ¶ 14.)

illustrate that the estate planning services provided by UFSC often are superfluous and sometimes financially unsound. Ruth Springer serves as one such example. A seventy-two year old unmarried retiree in 2002, Springer was sold a revocable living trust through UFSC in 2002 for approximately $2,500. (Report at 52, ¶ 139.) At that time, she owned Exxon Mobil stock worth approximately $500,000 that reflected the bulk of her net worth. (Report at 51, ¶ 135.) When she purchased the UFSC estate plan, Springer already had a valid will (for which she had paid $20 in 1987). Both the original will and the UFSC estate plan contained the same dispositive provisions for distribution of the stock among Springer's six nieces and nephews and, thus, the UFSC estate plan was of little or no value to Springer. (Report at 53-54, ¶¶ 143-44; Tr. at 108-09.) According to Springer, UFSC did not ask her if she already had a will, and none of her estate planning needs were discussed during her brief phone conversation with the panel attorney. (Report at 54, ¶ 145; ISBA Exh. 103, ¶ 5.) After helping Springer execute the new estate planning documents, a Financial Planning Assistant convinced Springer to purchase three deferred annuities to fund the trust, and Springer sold the entirety of her Exxon Mobil stock to do so. (Report at 55, ¶ 149; UFSC Exh. 65, 66; ISBA Exh. 103, ¶¶ 7-8.) The Financial Planning Assistant testified this was done to create cash flow for Springer. (ISBA Exh. 107, pp. 126-27.) However, Springer already was receiving

regular income from pension and social security payments, farming income, and stock dividends. (ISBA Exh. 101, pp. 19-27.)

The Financial Planning Assistant received a commission of $40,000 from UFSC for the sale of these annuities, and Springer incurred a tax liability of $132,000 as a result of the sale of her stock, which was a substantially greater liability than the Financial Planning Assistant had led Springer to expect. (Report at 7, 55-56, ¶¶ 16, 149, 152.) With the assistance of the Financial Planning Assistant, Springer then executed an amendment to the trust which provided that each of her six nieces and nephews would receive $5,000 instead of the Exxon Mobil stock. (Report at 56-57, ¶ 153; ISBA Exh. 103, ¶ 10.)[6]

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[6] Contemporaneous with the instant proceedings, Springer brought a separate civil action against several of the respondents. Presumably because the financial consequences of Springer's stock sale and purchase of annuities was not relevant to the issue of whether UFSC committed the unauthorized practice of law, neither the record in this case nor the Commissioner's findings squarely address or resolve the measure of these financial consequences. The record reflects the underwriter of the largest annuity Springer purchased, worth approximately $238,000, went into receivership, although UFSC contends that Springer was able to recover most of this money and purchase replacement annuities. (Report at 56, ¶ 151; ISBA Exh. 101, pp. 129-31, 137-63; Tr. at 77.) Springer's annuities had a minimum guaranteed interest rate of 3%. (ISBA Exh. 101, p. 122.) Meanwhile, Springer contends that the value of the Exxon Mobil stock more than doubled in the six years following Springer's sale of the stock. (*Id.* at 164, 169.)

Admittedly, Springer and the other clients named in the ISBA's verified petition reflect only a small fraction of those who have purchased estate plans from UFSC. As will be addressed in more detail below, it is conceivable that some clients may have received adequate estate planning services from UFSC and may be satisfied customers, notwithstanding the Commissioner's observation that "[n]ot a single satisfied [UFSC] customer appeared at trial to testify on behalf of [UFSC]." (Report at 7, ¶ 16.) Nevertheless, the experiences of Springer and the other UFSC clients identified in the ISBA's verified petition illustrate well the lack of meaningful attorney involvement in UFSC's business model and the consequences that may result.

III. Unauthorized Practice of Law

This Court's authority to set standards for and supervise the practice of law arises from the need to protect the public from those who are not properly licensed or qualified to act as attorneys. *State ex rel. Disciplinary Comm'n v. Owen,* 486 N.E.2d 1012, 1014 (Ind. 1986). Although it is the province of this Court to determine what acts constitute the practice of law, we have not attempted to provide a comprehensive definition because of the infinite variety of fact situations. *See Miller v. Vance,* 463 N.E.2d 250, 251 (Ind. 1984). Nor do we attempt to do so today.

Nevertheless, we have held that preparing and drafting a will, and giving advice regarding the

contents and effect of a will, constitute the practice of law. *See State ex rel. Pearson v. Gould,* 437 N.E.2d 41, 42 (Ind. 1982). Likewise, "[d]rafting and preparing testamentary and trust documents is clearly the practice of law." *State ex rel. Indiana State Bar Ass'n v. Northouse,* 848 N.E.2d 668, 673 (Ind. 2006). Indeed, UFSC does not question these principles; its contention instead is that its business practices are lawful due to the involvement of its panel attorneys.

Northouse provides meaningful guidance on this issue. Northouse, who was a registered securities representative and insurance agent but not an attorney, sold to clients "financial organization" books that included trust documents prepared by Ramer (also not an attorney) and Ramer's company STC. We held that Northouse and Ramer "crossed the line of permissible non-lawyer services and engaged in the unauthorized practice of law," notwithstanding the fact that attorney-drafted forms were used as the starting point for preparation of the documents ultimately included in the "financial organization" books. *Id.* at 672, 673.

Attempting to distinguish itself from the respondents in *Northouse,* UFSC argues that its business model is structured in a manner that sufficiently involves the exercise of independent professional judgment by attorneys, and notes that its panel attorneys play a greater role than merely drafting testamentary documents. We are convinced, however, that UFSC's business model has marginalized the attorney's role to such a degree as to cross the line of

permissible practices. We are also convinced that the changes UFSC indicates it has made to its business model in Indiana since the filing of the verified petition are cosmetic at best and are not remotely sufficient to prevent its business model from running afoul of the prohibition against the unauthorized practice of law.

Accordingly, we hold that respondents in this case have engaged in the unauthorized practice of law and should be enjoined from continuing to do so. We explore additional forms of relief below.

IV. Remedies

Among the remedies sought by the ISBA are requests that respondents be held liable for the ISBA's attorney fees and that respondents be required to disgorge fees collected from clients for unauthorized practices. Oral argument was invited with respect to these issues, and we commend counsel for their thoughtful presentations.

A. Attorney fees

Rule 24 provides, in part, that if a Commissioner is appointed to hear evidence and make findings, the "costs and expenses incurred by such hearing shall be borne by the losing party." The ISBA argues that "costs and expenses" under Rule 24 should include an award of attorney fees.

We are not persuaded that Rule 24, in its present form, provides a basis for an award of attorney fees. The Rule references only "costs and expenses," and the ISBA concedes that courts "generally construe 'costs' as a term of art that 'only includes filing fees and statutory witness fees.'" (Relator's Br. at 17 (citing *Nance v. Miami Sand & Gravel, LLC*, 825 N.E.2d 826, 839 (Ind. Ct. App. 2005)).) Citing the difficulty in prosecuting an original action alleging the unauthorized practice of law against a "well funded enterprise [] such as UFSC[,]" the ISBA urges that attorney fees should be read into the term "expenses." (*Id.* at 18-19.)

However, the ISBA did not request an award of attorney fees until its post-hearing brief, and the crux of the ISBA's argument in this respect is geared toward its allegation that UFSC's conduct in this litigation rested, at least in part, on baseless assertions and defenses. Accordingly, we believe the ISBA's entitlement to an award of attorney fees more appropriately is resolved by reference to Indiana Code section 34-52-1-1, which permits an award of attorney fees in "any civil action" where a party brings a defense, or continues to litigate a defense, when that defense is "frivolous, unreasonable, or groundless."

The Report of the Commissioner addresses the following claims made by UFSC during the course of this litigation in the context of its broader argument that the ISBA has an improper self-interest in bringing unauthorized practice actions under Rule 24. (*See* UFSC's Memorandum of Law in Support of its Motion

to Dismiss at 2.) Specifically, UFSC asserted that the ISBA previously has resolved unauthorized practice cases via "settlements [that] often take the form of a contribution to the ISBA" and that these contributions "can amount to hundreds of thousands of dollars." (*Id.* at 11, 15.) The Commissioner expressly found these claims were "not accurate and there was no factual basis for this argument." (Report at 25, ¶ 41.) UFSC was advised of these inaccuracies and, at its request, was provided with a written statement from the ISBA's Executive Director verifying that such practices had never been done.

Despite conceding it had no evidence the ISBA had received monetary benefit for settling any previous unauthorized practice case, UFSC continued to claim that the ISBA "planned on receiving a substantial monetary 'contribution' from the UFSC Respondents" in addition to the ISBA's request for costs and attorney fees. (UFSC's Reply Brief in Support of its Motion to Dismiss at 8.) In a subsequent pleading, UFSC accused the ISBA of attempting to commit a fraud on the court. (UFSC's Response to the ISBA's Objection/Motion to Strike at 5.) The Commissioner likewise found this claim to be baseless, false and without merit. (Report at 26, ¶ 46.)

With respect to UFSC's claims regarding the ISBA's past settlement practices, we agree with the Commissioner's finding that such claims were baseless, and we hold that the ISBA is entitled, under

section 34-52-1-1, to an award of attorney fees incurred as a direct result of these claims.

Less obvious is whether statutory attorney fees are warranted with respect to UFSC's claims regarding ISBA's settlement offer in the instant case. We agree with the Commissioner that these claims are without merit and that UFSC has "wrongly interpret[ed]" a letter of proposed settlement sent by ISBA's counsel, upon which UFSC based its assertion that the ISBA improperly was seeking a contribution as a condition of settlement. (Report at 26, ¶ 45.) Having reviewed the letter at issue, we conclude that the ISBA's reference to a "contribution," although undoubtedly a poor choice of words, was made "as a concept" within the context of addressing the remedies of disgorgement and attorney fees that the ISBA might request. (UFSC's Response to the ISBA's Objection/Motion to Strike, Exh. 1 at 2-3.) We do not read this letter as being indicative of any improper self-interest by the ISBA in bringing unauthorized practice actions under Rule 24. Nevertheless, under these circumstances, we exercise our discretion to decline to award attorney fees to the ISBA incurred as a result of these particular claims.

The Commissioner found that the ISBA had expended approximately $19,500 in attorney fees as a direct result of UFSC's claims regarding the ISBA's past and current settlement practices. Because we believe that statutory attorney fees are warranted only with respect to those attorney fees incurred as a result of UFSC's claims regarding the ISBA's past

settlement practices, we remand to the Commissioner for a determination of this amount.

B. Costs and expenses other than attorney fees

The Commissioner found that the ISBA paid $11,093.07 to its counsel for copying, phone calls, and other expenses routinely billed. The Commissioner additionally found that the ISBA paid $25,881.80 directly to various vendors for copies and transcripts and to attorney Sarah McShea, who gave testimony in rebuttal to Professor William Hodes, an attorney who testified on behalf of UFSC regarding his opinion that UFSC's business model was legitimate.

UFSC argues that the expenses paid to attorney McShea should not be recoverable by the ISBA under Rule 24, on the premise that expert testimony is inappropriate during unauthorized practice proceedings. While UFSC's objection to McShea's testimony as improper expert testimony originally was sustained by the Commissioner, McShea ultimately was permitted to testify only in rebuttal after UFSC presented Hodes's testimony. The Commissioner found both Hodes's and McShea's testimony instructive and helpful in making his findings. (Report at 20, ¶ 27).

We conclude that the sums cited by the Commissioner, including the amount paid to McShea, are properly included as "costs and expenses" under Rule 24 under the circumstances present here. The costs and expenses associated with the Commissioner's

services in this matter also shall be borne by the respondents.

C. Disgorgement

The remedy addressed in most of our prior decisions in unauthorized practice cases has been injunctive relief. *See*, e.g., *State ex rel. Indiana State Bar Ass'n v. Diaz*, 838 N.E.2d 433 (Ind. 2005); *State ex rel. Disciplinary Comm'n v. Crofts*, 500 N.E.2d 753 (Ind. 1986); *Owen*, 486 N.E.2d 1012; *State ex rel. Indiana State Bar Ass'n v. Indiana Real Estate Ass'n*, 244 Ind. 214, 191 N.E.2d 711 (1963).

Disgorgement was first addressed as a potential remedy in unauthorized practice actions in *Northouse*. Observing that the purpose of Rule 24 "is not to find fault or assess liability but to protect the public from those not properly licensed or otherwise qualified to act as attorneys," we held that in addition to an injunction, the respondents should be prohibited from retaining fees for unauthorized practices so as "to deter similar conduct in the future and, ultimately, to protect the public." *Northouse*, 848 N.E.2d at 674. We noted that the prohibition against the unauthorized practice of law would be much less effective if an offending party were permitted to retain fees collected for unauthorized services. *Id.*

The issue of disgorgement is more complex here than it was in *Northouse*. In that case, the respondents were charged with unauthorized practices in only eight instances over an approximately two-year

span, and the briefs filed by the respondents did not deny that they had engaged in the unauthorized practice of law. In contrast, UFSC contends it structured its business model in good faith and performed due diligence in attempting to ensure its practices were permissible. Moreover, UFSC has been marketing and selling estate plans since 1995, and sold 1,306 estate plans in Indiana from October 2006 through May 2009 alone.

UFSC sought and obtained advice regarding the legality of its business model from at least three different sources. One of these sources, Professor Hodes, offered his opinion to UFSC in 2006 that its business model did not involve the unauthorized practice of law. Nevertheless, at least two events should have alerted UFSC that it was committing unauthorized practices. In 2006, *Northouse* announced that the sale of estate plans and preparation of related legal instruments by non-attorneys constituted the unauthorized practice of law, even where the forms used to create the legal instruments originally had been created by an attorney. And well before *Northouse,* attorney Bruce Kotzan, from whom UFSC solicited legal advice regarding its business model, warned UFSC in 1999 that it

> is my opinion that you can employ attorneys to represent individuals in the course of your marketing of estate planning products, but the lawyer's representation of the clients must truly be independent. The attorney

> must represent the client and not the company. There must be contact between the client and the attorney. In the event employees of the company engage in the gathering of information for the preparation of documents, these employees must be acting under the direction of the attorney.

(Report at 8, ¶ 17; ISBA Exh. 14 at 3). Kotzan's advice was correct but was not followed by UFSC.

We pause for a moment to consider the value and necessity of a disgorgement remedy. Many of UFSC's clients may have civil causes of action against one or more respondents available to them, and in fact the record discloses that some UFSC clients have received at least some remedy through separate civil actions. For those persons such as Ruth Springer, whose involvement with UFSC seemingly has resulted in identifiable harm to her estate planning needs and financial portfolio, a civil action may prove a more adequate and complete remedy. For other clients of UFSC, however, including those who conceivably may prove to be satisfied customers, mere notice and opportunity to request a refund likely will be adequate.

Notwithstanding the potential availability of other civil remedies, we believe disgorgement or a similar form of restitutionary remedy serves as a more reliable and effective deterrent against the unauthorized practice of law and better protects the public from such practices. Persons or companies should be deterred from the unauthorized practice of

law irrespective of the actual harm their conduct may cause, and the fact that some of the persons who have purchased estate plans from UFSC may have received a product adequate for their needs does not alter the illegality of UFSC's conduct.

We are left to determine the appropriate scope and manner of a restitutionary remedy in this case. Alluding to due process and *ex post facto* concerns, and noting that *Northouse* was the first unauthorized practice action in which we ordered disgorgement, UFSC argues that any restitutionary order issued in this case should extend back no further than the date of the *Northouse* decision because UFSC was not "on notice that disgorgement was a potential punishment" prior to *Northouse*. We are not persuaded by this line of reasoning for at least two reasons. First, disgorgement is not a "punishment" but rather an equitable form of relief. *Nichols v. Minnick*, 885 N.E.2d 1, 4-5 (Ind. 2008); *Wenzel v. Hopper & Galliher, P.C.*, 830 N.E.2d 996, 1001 (Ind. Ct. App. 2005). Second, as we observed in *Northouse*, appellate courts previously have held in an analogous setting that a non-lawyer plaintiff is not entitled to recover a fee for rendering legal services. *Id.* at 674 n.3 (citing *Fink v. Peden*, 214 Ind. 584, 17 N.E.2d 95 (1938), and *Harris v. Clark*, 81 Ind.App. 494, 142 N.E. 881 (1924)).

Nevertheless, as discussed above, we do think *Northouse* is relevant to the issue of disgorgement to the extent it should have put UFSC on clear notice that its practices were unlawful. Regardless of

whether UFSC acted properly prior to *Northouse* to ascertain whether its practices were lawful, the illegality of UFSC's business model certainly should have been apparent after *Northouse*. Accordingly, we conclude UFSC should not be entitled to retain fees collected for the sale of estate plans following the date of the *Northouse* decision.

In *Northouse,* we ordered the respondents to provide notice of our opinion to the clients who had purchased the "financial organization" books at issue, in order to enable those clients to make informed decisions regarding their estate planning needs and any potential civil actions that they might pursue separately against the respondents. Under the circumstances of this case, we believe it is appropriate to fashion a restitutionary remedy in connection with such a notice requirement. In addition to providing individual written notice of this opinion to all readily identifiable persons to whom it has sold estate plans, UFSC also shall provide individual written notice to all such persons to whom estate plans were sold following the date of the *Northouse* decision in 2006 that they are entitled to a refund, upon request, of sums paid for the purchase of an estate plan.

We note that the parties agreed, and the Commissioner ordered, that UFSC preserve records identifying clients who had purchased estate plans from the inception of such sales in 1995. (Report at 82, ¶ 253.) Recognizing the complexity of UFSC's corporate structure, the involvement of multiple respondents in the sale of the estate plans, and the

substantial number of clients affected, we remand to the Commissioner with instructions to resolve the particular details such notice shall take and to issue a restitutionary order not inconsistent with this opinion.

V. Conclusion

The evidence establishes that the respondents have engaged in the unauthorized practice of law. Respondents, including any parent or subsidiary company of UFSC, hereby are ORDERED not to engage in acts that would constitute the unauthorized practice of law. Such acts include, but are not limited to, the practices described in this opinion as well as the revised practices in which UFSC now claims to engage, as described in paragraph 24 of the Commissioner's report. This injunction does not prevent the respondents from performing non-legal services for their clients.

In addition, Respondents are ORDERED to provide a copy of this opinion to all reasonably identifiable persons to whom they have sold estate plans since 1995. This notice is intended to allow each purchaser the opportunity to make an informed decision regarding their estate planning needs and take any other action that may be appropriate, including consultation with a duly licensed attorney of his or her choosing. Respondents also are ORDERED, in a manner that shall be determined by the Commissioner on remand, to notify all reasonably identifiable persons

to whom estate plans were sold following the date of the *Northouse* decision in 2006 that they are entitled to a refund, upon request, of sums paid for the purchase of an estate plan.

It is further ORDERED that Respondents are jointly and severally responsible for the refund of fees paid by those to whom estate plans were sold, as may be requested by those to whom estate plans were sold. On remand, the Commissioner shall issue a restitutionary order consistent with this opinion which, if appropriate, also may be made applicable to all parent and subsidiary companies of UFSC and their principals individually.

It is additionally ORDERED that Respondents are jointly and severally responsible for the reasonable attorney fees, in an amount that shall be determined by the Commissioner on remand, incurred by the ISBA as a direct result of the respondents' baseless arguments with respect to the ISBA's past settlement practices.

It is finally ORDERED that Respondents are jointly and severally responsible for the payment of costs and expenses to the ISBA in the amount of $36,974.87, and for the payment of costs and expenses associated with the Commissioner's services in this matter, which shall be fixed by separate order of this Court following the Commissioner's submission of his statements of costs and expenses to this Court.

This matter is remanded to the Commissioner for further proceedings consistent with this opinion.

Dickson, Sullivan, Boehm, and Rucker, JJ., concur. Shepard, C.J., concurs in all respects save the decision on attorney fees, Part IV-A, believing that Relator's request for fees incurred in prosecution should be granted.

IN THE
INDIANA SUPREME COURT

STATE OF INDIANA, EX REL. INDIANA STATE BAR ASSOCIATION, Relator, vs. UNITED FINANCIAL SYSTEMS CORP., RICHARD FOLLETT, JAYNE A. FOLLETT, RICHARD L. FOLLETT II, BEAU R. FOLLETT, JODY WAUGH, RAYMOND C. PHILLIPS, JOHN JOYCE, ESQ., GARY LOVELADY, SHARON DORSEY, SHERRY JORDAN, and JAMES BOYLES. Respondents.	)	Cause No. 94S00-0810-MS-551

REPORT OF THE COMMISSIONER

(Filed Jul. 13, 2009)

This matter is before the Indiana Supreme Court as an original action, brought by the Indiana State Bar Association against United Financial Systems Corporation and certain individual Respondents, alleging that Respondents engaged in the unauthorized practice of law. The undersigned, Bruce C.

Embrey, was assigned by the Court, with the agreement of the parties, as the hearing officer herein, and charged with the responsibility of making findings of fact on which the Court may base its Conclusions of Law.

Hearing was held in the offices of Bose McKinney beginning May 27 and concluding on May 29, 2009. Relator appeared by Kevin McGoff, Rafael A. Sanchez and Margaret M. Christensen, all of Bingham McHale, LLP. Respondent appeared by Ronald Elberger, Peyton L. Berg, Suzanna Hartzell-Baird and Robert B. Clemens of Bose McKinney and Evans. The parties submitted Stipulation of Facts prior to hearing which are attached and which the Commissioner intends be part of the Findings of Fact he submits. In addition, the parties entered into the following stipulations prior to, and in the course of, the hearing:

1. The parties stipulate and agree that the Verified Petition and the Verified Return are before the Commissioner and the Court as evidence for use in making findings of fact, conclusions of law, or any other ruling in the above-captioned original action, except for the allegations in paragraphs 77 and 79 relating to whether Respondent Raymond Phillips advised Ruth Springer to sell her shares of Exxon Mobil stock. [Amendment To Pre-Trial Conference Order, May 23, 2009]

2. The ISBA has never settled an unauthorized practice of law case in exchange for money from an

individual or corporation accused of violating the unauthorized practice of law provisions of Indiana law. Further no costs or fees have even been received by the ISBA in the course of processing these cases. [Tr. 4:1-7]

3. From October 2006 to March 29, 2009, .09% of United Financial's total income from all operations nationwide is derived from the sale of estate planning assistance services in Indiana. [Tr. 576:7-13]

4. From October 2006 to March 29, 2009, 18.8% of the fee income United Financial makes from all operations nationwide is derived from the sale of estate planning services in Indiana. [Tr. 576:15-21]

COMMISSIONER'S FINDINGS OF FACT

I. Commissioner's Brief Summary of United Financial's Business Model

1. United Financial Systems Corp. ("United Financial" or "UFSC") is an insurance marketing agency. The principals of the company are all members of the Follett family. In 1995, the President Richard Follett, with virtually no direction from counsel, began to market and sell estate planning services, which include wills and trusts. The business grew over the years and the company is very successful financially. In the State of Indiana alone, from October of 2006 through May of 2009, 1,306 estate plans were sold from which UFSC grossed in excess of $2.7 million dollars.

2. Presently, United Financial is doing business in thirteen (13) states; New Jersey, Pennsylvania, Michigan, Indiana, Illinois, Wisconsin, Ohio, Kansas, Oklahoma, Texas, North Carolina, Florida and Kentucky. Indianapclis is the corporate headquarters and from there United Financial's business is managed. United Financial's gross revenues derived from all sources throughout the count y was in excess of $29,000,000 from October of 2006 through May of 2009.

3. United Financial spends millions of dollars targeting and then mailing prospective customers/ clients, mostly retirees, information on how to avoid probate. Since this lawsuit was filed the company professes to have changed the card that is mailed in Indiana, and the solicitation now offers to provide information about Medicare supplemental insurance, not estate planning products.

4. Most of the customers are approached after responding to the mailings. However, some are referrals from existing United Financial clients or have purchased products from United Financial in the past and are contacted in an effort to make additional sales.

5. A United Financial sales representative, referred to as an EPA (Estate Planning Assistant) or an HPA (Health Planning Assistant), makes an appointment and meets with the prospective customer. United Financial has structured its business such that nearly everyone who comes into contact

with the client is considered by UFSC to be an independent contractor, including the EPA, HPA, FPA (Financial Planning Assistant) and the lawyer drafting the documents.

6. The intent of the company is to get before an audience of almost always elderly people, and gain access to their financial information, which is later used in an effort to sell insurance products that generate substantial revenue for the company; far greater revenue than the trust and estate documents. The EPA/HPA acquires the financial information of the client, justifying it as a part of the process of educating clients on probate and having an estate plan that will avoid it. The EPA/HPA, who has been trained by United Financial on wills, trusts, probate, UPL and how to close a sale, discusses the pitfalls of probate with the client. The sales person also has a set of materials produced by United Financial to use in making the presentation.

7. The materials tout the United Financial team, to which the client will have access as a part of the service, indicating it includes a tax strategist, financial consultants, independent attorneys, Medicaid planning and estate planning assistants. In reality, however, the company has no tax strategists and some of the victims identified in this action would have benefitted from tax advice before selling their assets and replacing them with United Financial's products.

8. The EPA/HPA's goal is to sell a will or a trust for which the EPA/HPA receives a commission. The records of the company reviewed reflect that nearly ninety-five percent (95%) of the clients purchased the most expensive plan, for which they paid $2,695 for a will, trust, powers of attorney, deeds and the promise of future amendments if needed. The EPA/HPA is paid $750 for the first sale of each week and $900 for each one thereafter. By comparison, the Panel Attorneys are paid $225.00 for drafting the documents.

9. United Financial provides a form which the EPA/HPA is instructed to complete with the client. Personal financial information, such as a list of assets and debts and their values, retirement accounts, real estate and the like is solicited. This information is not necessary to determine eligibility for life insurance or a Medicare supplemental policy. There are two reasons United Financial procures this financial information: (1) it is necessary for preparing estate planning documents; and (2) the company will have those documents delivered by another agent, known as an FPA, who will use that knowledge to try and sell the client United Financial insurance products, typically annuities. The EPA/HPA is not directly supervised by a lawyer. The client is assured their information will be kept confidential but there is no attorney-client privilege or duty of confidentiality. In truth, their financial information will be shared with another commission sales person, unbeknownst to the client at the time they divulge it to the FPA.

10. Once a sale is made, the EPA/HPA is trained to secure payment on the spot. He or she takes either a check or payment by credit card and returns the documents and payment to United Financial. The documents are routed to the company's in-house lawyer, David McInerney, who is licensed in the state of Indiana. Mr. McInerney then selects one of the lawyers with whom United Financial has contracted and provides them the information. The estate plans sold throughout the country by agents of United Financial are all processed in Indianapolis and Mr. McInerney assigns lawyers in Indiana and the other states to draft documents for all of these plans.

11. The lawyers are referred to as Panel Attorneys. They too have an independent contractor's agreement with United Financial. The Panel Attorneys call the client, having before him or her information the sales representative procured, knowing that the customer has paid for a certain estate plan. United Financial professes that the Panel Attorneys act independently of the company and ensure that the client has an estate plan, a will or a trust that is both suitable and tailored to that person.

12. From October, 2006 to May, 2009, nine (9) people (out of 1,306) downgraded, meaning they purchased a comprehensive estate plan from an EPA/HPA and later, presumably after talking to the Panel Attorney, determined they did not need the more expensive plan.

13. Typically, the only communication between the Panel Attorney and the client is this phone call., although the is no prohibition imposed by USFC on direct contact between the Panel Attorney and the client. It is simply not financially feasible for the Panel Attorney to meet with clients, given the small fee collected for each set of documents. Based upon the call and the information the EPA/HPA procured, the Panel Attorney prepares the legal documents. They also correspond with the client and memorialize a waiver of the attorney-client privilege, permitting the attorney to send the completed legal work to United Financial for delivery by an FPA.

14. The wills and trusts the Commissioner reviewed are markedly similar. There are identical clauses, despite the fact that the documents reflect that they were prepared by different lawyers, as many as five years apart. These documents contained clauses totally inapplicable to the client, such as provisions for distribution to children for a woman over 70 years old who had never had children, community property provisions not applicable in Indiana, and what was described as a "post-death" trust that was completely meaningless and unnecessary. In each instance about which there was evidence, the individuals' present counsel testified that the United Financial documents were flawed. In several instances the United Financial plan did not change the distribution of assets found in the will already in place, accomplishing nothing for the client.

15. After the Panel Attorney prepares the documents, they are sent to United Financial to be bound. Yet another independent contractor, known as an FPA, who is an agent of United Financial is paid $75 to deliver the documents and assist the client in executing them. The FPAs are primarily compensated by selling insurance products and they have a quota to sell products with a value of at least $75,000 each week.

16. The FPA has access to the financial information of the client, secured during the course of the sale by the EPA/HPA. The FPA reviews the will and/or trust, secures signatures and then endeavors to sell insurance products, generally annuities, to the customer. The lawyer is to be available by phone should a question arise during the review of the documents. Two of the victims who gave testimony in these proceedings sold hundreds of thousands of dollars in stock they owned, and used the proceeds to pay the tax consequences of the sale and to purchase annuities from United Financial. Both were misled as to the amount of tax that they ultimately incurred. In another instance, a victim was enticed to cash in annuities that she had in place, suffering a substantial penalty, as well as a tax obligation, and she then purchased annuities from United Financial with less favorable terms. As to each of the victims who either testified or presented evidence by affidavit, there were either serious flaws in the documents prepared by the attorney assigned by United Financial or they did not need the will or trust

because their estate planning needs had already been met. In one instance, the documents prepared by counsel selected by United Financial did nothing different than what the person already had in place. Other than brief self-serving statements by one of United's agents, there was no evidence of satisfied customers produced by United Financial. Not a single satisfied United Financial customer appeared at trial to testify on behalf of United Financial.

17. United Financial solicited input from several outside counsel over the years. In 1999, the company was advised by Bruce Kotzan to insure that those gathering the information for the preparation of documents act under the direction of the attorney. This advice was ignored. Mr. Kotzan rendered his opinion to UFSC in a lengthy letter in which he made the following statements:

> "It is my opinion that you can employ attorneys to represent individuals in the course of your marketing of estate planning products, but the lawyer's representation of the clients must truly be independent. The attorney must represent the client and not the company. There must be contact between the client and the attorney. In the event employees of the company engage ion the gathering of information for the preparation of documents, these employees must be acting under the direction of the attorney."

18. In 2000, UFSC engaged the services of the Cremer & Burroughs law firm which recommended several changes in the forms used by UFSC, resulting

in revisions to their "Agreement and Receipt" and "Notice of Right To Cancel" forms. Petition Exhibit 15.

19. Cremer & Burroughs also recommended changes which UFSC implemented in the following forms:

a. EPA and FP Agreements. Petition Exhibits 16, 18 and 20.

b. Further revision to the "Agreement and Receipt "which included the following language: "Client acknowledges and UFSC hereby agrees that UFSC will not interfere with the attorney's independent professional judgment, with the attorney-client relationship or the privilege of confidentiality between the attorney and the client." Petition Exhibit 17.

20. Additionally, in 2004 Cremer & Burroughs attorneys recommended, and UFSC implemented, new client engagement letters, client completion letters, execution instruction letters (instructions from the panel attorney to the FPA relating to the execution of estate planning documents) and an attorney checklist. Petition Exhibit 21.

21. In 2006, UFSC engaged Professor William Hodes to review its business model, and Professor Hodes opined that there was no UPL. (Further discussion of Professor Hodes testimony appears later in these Findings). Tr. At 752 and 753.

22. Complaints about United Financial were brought to the attention of the Indiana State Bar Association's ("ISBA") committee on unauthorized practice of the law in 2006. In most cases, the UPL committee resolves matters without recommending to the ISBA Board of Governors that a cause of action should be filed. The matter was investigated and United Financial afforded the opportunity to respond to the inquiry. United Financial ultimately refused to provide many of the documents requested by the UPL committee. The ISBA then brought this action. Kolb deposition.

23. United Financial changed some of it practices after this case was filed. However, the current business model is virtually the same as that upon which the allegations in the Verified Petition were based. The modifications to some of the company's practices made in response to the filing of this case do not change the business plan. Some of the changes are substantial and many are superficial or cosmetic.

24. In its Proposed Findings of Fact, UFSC provided its version of the changes implemented in an attempt to come into compliance with UPL rules. There is testimony in the record to support each of the proposed findings of fact, although there is strong suspicion that the actual implementation and effect vary greatly. In all fairness to UFSC, the Present Practices findings proposed by UFSC are repeated below verbatim:

a. Among other things, UFSC's General Counsel trains Health Planning Assistance Representatives ("HPAs") and FPAs on general estate planning, estate planning documents, and avoiding the unauthorized practice of law through examples from case law in Indiana and other jurisdictions as well as a list of "dos and don'ts." Hearing Transcript ("Tr.") at 142:3 to 143:1, 459-462:24, 447:14 to 478:4, 478:12 to 479:14, 642:5-17; Representative Training Slides (April 2009) Legal and Compliance Issues, UFSC Exhibit 112; Representative Training Slides (Legal Issues), UFSC Exhibit 24; Estate Planning Assistance Representatives Policy and Procedure Guide, UFSC Exhibit 27, pages 5 to 6; Indiana Estate Planning Assistance Representative Unauthorized Practice of Law Training Slides, UFSC Exhibit 31, Reprint of Office Unauthorized Practice of Law Banner, UFSC Exhibit 32.

b. UFSC's General Counsel updates his training materials in the area of compliance and UPL several times a year. Tr. at 461:16 to 462:11, 477;10-11, 478:5-15.

c. UFSC's General Counsel participates in the weekly FPA training conference calls to answer legal questions. Tr. at 142:3-23, 491:22 to 492:9.

d. In January 2007, UFSC contracted with Coventry Health Care, Inc. to be its

provider of Medicare supplemental insurance products. Tr. at 586:17 to 587:1.

e. In August 2008, UFSC hired Brenda Wright as its Health Planning Assistance Sales Director to establish its new Health Planning Assistance Division. Tr. at 587:6-19.

f. UFSC has not had any Estate Planning Assistance Representatives in Indiana since May 4, 2009. Tr. at 292:23 to 293:6, 463:18-23, 464:12-13, 583:24 to 484:4.

g. UFSC no longer sends direct mail cards relating to estate planning assistance services to anyone in Indiana. Tr. at 293:7-21, 482:2-8, 529:11-14, 611:24 to 612:2.

h. UFSC does not offer corporate entity formation or family limited partnership formation services. Tr. at 479:15 to 480:1, 516:2-8, 520:11-14.

i. HPAs execute independent contractor agreements.

j. HPAs receive IRS form 1099s, UFSC does not set regular office hours for HPAs, HPAs are not reimbursed for expenses such as mileage, meals, or lodging, and UFSC does not provide HPAs with cell phones, computers, or company vehicles.

k. HPAs make an educational presentation to prospective customers about the Medicare program and related insurance products.

Tr. at 465:4-15; Medicare Supplement Presentation, UFSC Exhibit 111.

l. HPAs offer UFSC's estate planning assistance services to customers as an ancillary service and subsequent to an insurance product presentation. Tr. at 464:20-24, 465:4-21, 466:7-16, 588:25 to 589:22, 590:24 to 591:7.

m. During the initial Medicare program, HPAs ask the prospective customer a series of questions to determine the customer's insurance needs and record the customer's answers in a HPA Preliminary Worksheet, UFSC Exhibit 115. Tr. at 588:25 to 589:22.

n. Four questions in the "final expenses/ survivors' income" section of the HPA Preliminary Worksheet relate to estate planning:

Do you presently have any type of will or living trust?
If yes, when were the documents last reviewed?
If a trust, has it been funded?
When you set-up your will/trust did you discuss it with your children?

HPA Preliminary Worksheet, UFSC Exhibit 115.

o. If the prospective customer indicates that they do not have a will or trust, or that they are not satisfied with their current estate plan, then the HPA is authorized to offer estate planning assistance services. Tr. at 464:20-24, 465:4-21, 466:7-16.

p. The HPA is trained to schedule a subsequent appointment with the prospective customer to discuss estate planning assistance services and to adhere to the scripted presentation.

q. The scripted presentation begins with the disclaimer that the HPA is not a lawyer, and that UFSC is not a law firm. Estate Planning Assistance Services Presentation Disclaimer, UFSC Exhibit 21.

r. The customer selects and applies for the estate planning assistance service program that the customer feels best suits his or her needs. Tr. at 408:11-15, 409:2-8, 447:2 to 448:2, 535:24 to 536:17, 566:2-5, 595:16 to 596:17, 597:8-14.

s. An application for estate planning assistance services includes the following forms: Personal and Financial Organizer, Agreement and Receipt, Letter of Understanding and Notice of Right to Cancel. Basic Estate Planning Assistance Application Checklist, UFSC Exhibit 121; Comprehensive Estate Planning Assistance Application Checklist, USFC Exhibit 122; Adopt A Trust Estate Planning Assistance Application Checklist, UFSC Exhibit 123.

t. All UFSC customers are encouraged to discuss their estate planning needs with an attorney. Basic Estate Planning Program Letter of Understanding, UFSC Exhibit 102, Paragraph 5; Comprehensive

Estate Planning Program Letter of Understanding, UFSC Exhibit 103, Paragraph 5; Adopt A Trust Planning Program, UFSC Exhibit 104, Paragraph 9.

u. Estate planning assistance services customers are advised in writing at the time of the application that UFSC offers insurance products which generate a commission for UFSC and for the representative. Basic Estate Planning Assistance Services Program Letter of Understanding, UFSC Exhibit 102; Comprehensive Estate Planning Assistance Services Program Letter of Understanding, UFSC Exhibit 103; Adopt A Trust Estate Planning Assistance Services Program Letter of Understanding, UFSC Exhibit 104.

v. Panel attorneys sign independent contractor agreements with UFSC. Tr. at 463:16-17, 523:18 to 525:5, 670:22 to 671:13.

w. Panel attorneys receive IRS form 1099s from UFSC. Tr. at 673:15-19.

x. UFSC does not require that panel attorneys work set hours. Tr. at 530:14-19, 671:17-18.

y. UFSC does not provide panel attorneys office space. Tr. at 489:15-16, 671:14-15.

z. UFSC does not reimburse panel attorneys for mileage, meals, or lodging expenses. Tr. at 671:22-25.

aa. UFSC provides to panel attorneys administrative guidelines, a sample engagement letter, a sample acknowledgement and consent form, and a sample transmittal letter. Tr. at 459:4-15, 488, 490-91; Panel Attorney Guidelines, UFSC Exhibit 44; Sample Indiana Engagement Letter, UFSC Exhibit 45; Sample Estate Plan Execution Instructions, UFSC Exhibit 51.

bb. Panel attorneys are free to modify, revise, and issue their own engagement letters. Tr. at 486:2-13, 488:9 to 489:14, 674:15-23, 677:17-22.

cc. UFSC does not provide any sample estate planning documents to the panel attorneys. Tr. at 500: 20 to 501:3.

dd. UFSC currently has independent contractor agreements with two panel attorneys who are licensed to practice law in the State of Indiana. Tr. at 597:23 to 598:10, 670:22 to 671:13.

ee. UFSC's General Counsel, with the customer's express written authorization, refers a particular estate planning assistance services program application to a particular panel attorney, usually based upon the customer's state of residence and geography. Tr. at 458:8 to 459:3, 484:3-15, 598:21-23, 676:24 to 677:12; Basic Estate Planning Assistance Services Program Agreement and Receipt, UFSC Exhibit 105, Paragraph 3; Comprehensive Estate Planning Assistance Services Program

Agreement and Receipt, UFSC Exhibit 106, Paragraph 3; Adopt a Trust Estate Planning Assistance Services Program Agreement and Receipt, UFSC Exhibit 107, Paragraph 3.

ff. UFSC, with the customer's express written authorization, pays the customer's legal fees for any legal documents prepared by a panel attorney. Tr. at 473:17-18, 474:3-4; Basic Estate Planning Assistance Services Program Agreement and Receipt, UFSC Exhibit 105, Paragraph 4; Comprehensive Estate Planning Assistance Services Program Agreement and Receipt, UFSC Exhibit 106, Paragraph 4; Adopt a Trust Estate Planning Assistance Services Program Agreement and Receipt, UFSC Exhibit 107, Paragraph 4.

gg. UFSC does not interfere with the independent judgment of the panel attorney regarding what, if any, legal documents to prepare for their client. Tr. at 484:24 to 485:14, 493:5-10, 596:1 to 597:14, 674:15 to 675:2, 675:10-17, 676:3-6; Representative Training Slides (April 2009) Legal and Compliance Issues, UFSC Exhibit 112, pages 29-30.

hh. UFSC refunds, in whole or part, the estate planning assistance services program fee paid by the customer in the event the customer requests a refund or the independent attorney downgrades the selected program, determines that a different

estate planning assistance services program is more suitable for their client, or determines that an estate planning assistance services program is not necessary or appropriate. Tr. at 456:8-15, 531:10-24, 602:12 to 603:6; Estate Planning Assistance Services Policy and Procedure Guide, UFSC Exhibit 27, pages 27-28.

ii. In the event of a refund, the panel attorney is only paid a flat fee for the initial consultation. Tr. at 470:15 to 471:23; Panel Attorney Guidelines, UFSC Exhibit 44, pages 17-18.

jj. Panel attorneys have downgraded, changed, and rejected estate planning assistance services program applications after consulting with the client. Tr. at 294:16 to 297:10, 530:20 to 531:2, 536:18 to 537:1, 554:13 to 555:5, 686:15 to 690:4.

kk. A downgrade or rejection of an estate planning assistance services program by a panel attorney is not subject to review or override by UFSC. Tr. at 485:5-14, 597:15-22, 688:11-17, 689:3 to 690:4.

ll. Panel attorneys receive an estate planning assistance services program application from UFSC and contact the prospective client to verify the financial information and discuss the suitability of the selected program. Tr. at468:1-12, 676:24 to 677:12, 683:16 to 684:17; Representative Training

Slides (April 2009) Legal and Compliance Issues, UFSC Exhibit 112, pages 32-33.

mm. Panel attorneys consult directly with the clients they represent, collecting and confirming whatever information they need. Tr. at 676:24 to 677:12; Basic Estate Planning Assistance Services Program Letter of Understanding, UFSC Exhibit 102, Paragraph 6; Comprehensive Estate Planning Assistance Services Program Letter of Understanding, UFSC Exhibit 103, Paragraph 6; Adopt A Trust Estate Planning Assistance Services Program Letter of Understanding, UFSC Exhibit 104, Paragraph 6; Panel Attorney Guidelines, UFSC Exhibit 44, paragraphs 7 and 8; Sample Panel Attorney Agreement, UFSC Exhibit 25, paragraphs 2 and 3.

nn. At the conclusion of the consultation, the panel attorney sends an engagement letter to the client. Tr. at 468:3-5, 681:4 to 682:19; Representative Training Slides (April 2009) Legal and Compliance Issues, UFSC Exhibit 112, pages 32-33.

oo. Once the engagement letter is signed and returned to the panel attorney, the attorney prepares the estate planning documents. Tr. at 468:6-12, 682:6-19; Representative Training Slides (April 2009) Legal and Compliance Issues, UFSC Exhibit 112, pages 32-33.

pp. All legal services for UFSC customers are provided by, and all legal documents for UFSC are drafted by, licensed Indiana attorneys. Tr. at 534:3-13; Basic Estate Planning Assistance Services Program Letter of Understanding, UFSC Exhibit 102, Paragraph 3; Comprehensive Estate Planning Assistance Services Program Letter of Understanding, UFSC Exhibit 103, Paragraph 3; Adopt A Trust Estate Planning Assistance Services Program Letter of Understanding, UFSC Exhibit 104, Paragraph 5.

qq. The role of an independent panel attorney is to provide legal advice to, and, if appropriate, to draft all suitable legal documents for, clients referred to them by UFSC. Sample Panel Attorney Agreement, UFSC Exhibit 25, Paragraph 2; Panel Attorney Guidelines, UFSC 44, Sections 1 and 13; Representative Training Class Slides – (April 2009) Legal and Compliance Issues, UFSC Exhibit 112, Slides 10-11, 57-65.

rr. The independent panel attorney secures their client's express permission, including a waiver of attorney-client confidentiality, to allow a UFSC financial planning assistance representative ("FPA") to deliver the customer's estate plan. Tr. at 468:6-12, 486:2-13, 488:9 to 498:4, 682: 6-19; Sample Engagement Letter, UFSC Exhibit 45.

ss. The independent panel attorney provides their client and the FPA with written instructions regarding the execution of the customer's estate plan. Tr. at 129:19 to 130:7, 491:5-21, 643:3-25, 682:20 to 683:15; Sample Transmittal Letter, UFSC Exhibit 50; Sample Execution Instructions, UFSC Exhibit 51; Sample Delivery Acknowledgment, UFSC Exhibit 52.

tt. Indiana Panel attorneys do not routinely personally deliver estate planning documents to their clients. Tr. at 498: 22-23, 690: 5-14.

uu. All customer legal questions which arise during an estate plan execution are referred to and resolved by the independent attorney who drafted the customer's estate planning documents prior to the documents being executed. Tr. at 140: 2-13, 651:16 to 652:13, 690:15 to 691:5; Financial Planning Assistance Representative Policy and Procedure Guide, UFSC Exhibit 48, Page 19; Representative Training Slides (April 2009) Legal and Compliance Issues, UFSC Exhibit 112, page 3.

vv. UFSC's general counsel is available to take legal questions from FPAs in the event the panel attorney is not available and has done so in the past, with the exception of questions relating to the content of specific estate planning documents drafted by the panel attorney. These questions are

redirected to the panel attorney. Tr. at 140:5-13, 492:10 to 493:4, 499:7 to 500:2, 644:5-11.

ww. The client specifically approves, authorizes, and consents to UFSC printing and binding the estate planning documents prior to execution, and to an FPA delivering the estate planning binder to the client for purposes of execution. Tr. at 490:5-16.

xx. UFSC trains FPAs on the proper delivery and execution of estate planning documents. Tr. at 642:18 to 643:25.

yy. FPAs are notaries public and are able to notarize the estate planning documents. Tr. at 643:20-22.

zz. FPAs are trained to contact the panel attorney in the event a legal question arises at execution. Tr. at 139:23 to 140:13, 644:5-11, 644:19 to 645:6, 651:16 to 652:13; Financial Planning Assistance Representatives Policy and Procedure Guide, UFSC Exhibit 48, page 19.

aaa. FPAs are trained to refer to the panel attorney any questions specifically related to an estate planning document that applies to the particular client. Tr. at 129:21 to 130:7, 139:23 to 141:7, 147:25 to 148:9, 644:5-11, 644:19 to 645:6, 651:16 to 652:13; Financial Planning Assistance Representatives Policy and Procedure Guide, UFSC Exhibit 48, page 19;

Representative Training Slides (April 2009) Legal and Compliance Issues, UFSC Exhibit 112, page 3.

bbb. FPAs do not explain the relevance, effect and purpose of specific documents or provide any legal advice in response to questions raised by a UFSC customer in the course of an estate plan delivery. Tr. at 129:19 to 130:7, 149:1-4.

ccc. Any revisions, corrections or changes requested by customer following their initial review to their estate planning documents during the delivery process are made by the drafting attorney only. Tr. at 645:7-23, 674:3-14.

ddd. UFSC customers, and not UFSC or its FPAs, are responsible for funding their own trusts. Tr. at 141:8-20, 148;13-21, 596;22 to 597:7, 649: 12-16, 691:6-25 Comprehensive Estate Planning Program Letter of Understanding, UFSC Exhibit 103, Paragraph 8(a); Financial Planning Assistance Representatives Policy and Procedure Guide, UFSC Exhibit 48, page 22.

25. Attorney Sarah McShea was retained by the ISBA to review United Financial's documents, particularly the marketing materials and letters of outside counsel providing opinions to the company. She devotes her practice exclusively to ethics and is well-versed on the topic of UPL, trust mills and the holdings in other states on similar cases that are

reported. Her credentials are set forth at Exhibit 32 and the documents that she reviewed were catalogued as Exhibit 31.

26. United Financial's objection to Ms. McShea's testimony, premised upon the assertion that she was an expert witness called to give testimony on the ultimate question of fact, was originally sustained. In the course of the hearing, United Financial called William Hodes, who provided the Commissioner his observations as to the United Financial business model, trust mills and his opinion as to the legitimacy of the United Financial business model. Therefore, the Commissioner allowed Ms. McShea's testimony as it was directly in rebuttal to that of Mr. Hodes.

27. The testimony of Ms. McShea [Tr. 5-62] as well as the testimony of Mr. Hodes [Tr. 741-819] were instructive to the Commissioner. They each provided a summary of divergent views on the issues.

28. It was Mr. Hodes' view, which he expressed to the ISBA in the course of the UPL Committee's investigation, that the United Financial business model is sound and does not involve the unauthorized practice of law, primarily because of the "tripartite" relationship between the company, the lawyers and the client. Mr. Hodes compared United Financial to functioning much as an insurance company does as relates to clients and third parties. This model is limited to the insurance field wherein consumers purchase insurance policies for various purposes,

among which is to be defended in claims made for which the policy provides coverage. That relationship contemplates confidentiality and the fiduciary duties of the lawyer to the client. There is typically a common interest between the insurance company and the client.

29. The lawyers who are preparing estate planning documents for United Financial do not represent United Financial, which is a critical difference between the property and casualty insurance model and United Financial's business model. There is not an aligned interest between the lawyer, the client and United Financial. United Financial does not protect client confidentiality. Further, the information the company imparts, in educating people about probate and the documents that are sold, such as health care proxy forms and living will, are available to members of the public free through the library, online websites and even hospitals and doctor's offices.

30. The financial information gained by the salesperson is unnecessary for the sale of life insurance or Medicaid supplemental insurance. The information is for the purpose of estate planning and to ascertain the client's assets used in effort to sell insurance products. The salesperson is not working at the direction or under the supervision of a lawyer. The information gained is not protected by the attorney-client privilege. The client provides this personal financial information not knowing that the

intent is to share it with an insurance salesman who will deliver the will and/or trust.

II. Preliminary Proceedings

31. On October 9, 2008, the Verified Petition of the Indiana State Bar Association to enjoin the Unauthorized Practice of Law was filed by the ISBA, against United Financial Systems Corp., Richard Follett, Jayne A. Follett, Richard L. Follett II, Beau R. Follett, Jody Waugh, Raymond C. Phillips, John Joyce, Gary Lovelady, Sharon Dorsey, Sherry Jordan, and James Boyles (hereinafter, the "UFSC Respondents"), along with Linda Dishong, L. Kay Larsen, Douglas J. Lalama, Andrew Eads, Katie Jackel.

32. Ronald E. Elberger, Roberts B. Clemens, Peyton L. Berg and Suzanna Hartzell-Baird of Bose, McKinney & Evans, LLP appeared on behalf of the UFSC Respondents. The other Respondents had separate counsel and Douglas Lalama was *pro se*.

33. The Indiana Supreme Court issued its Order regarding the appointment of a Commissioner to hear evidence and report his findings to the Court on January 30, 2009.

34. The Respondents filed their Verified Returns to Verified Petition as follows:

a. Respondent L. Kay Larsen on November 14, 2008;

b. UFSC Respondents on January 13, 2009;

c. Respondent Andrew Eads on January 14, 2009; and

d. Respondent Linda Dishong on January 15, 2009.

e. Respondents Douglas J. Lalama and Katie Jackel did not file Verified Returns to the Verified Petition.

35. On March 2, 2009, the parties filed their Stipulation Regarding Appointment of Commissioner wherein it was agreed that the undersigned, Senior Judge Bruce Embrey of Peru, Indiana be appointed, if approved by the Indiana Supreme Court. The Court appointed the undersigned as Commissioner on March 4, 2009.

36. The ISBA entered into Settlement Agreements and Releases with Respondents Douglas Lalama, Linda Dishong (Christiana), L. Kay Larsen, Katherine Jackel and Andrew M. Eads whereby those Respondents agreed to a Permanent Injunction enjoining them from:

a. Holding employment or otherwise be engaged, in any capacity, with United Financial or otherwise being engaged or employed by any other provider of estate planning services that operates under a business model similar to that of United Financial, as set forth in detail in the Verified Petition . . . ;

b. Initiating contact or communicating with, directly or indirectly, through or with the assistance of United Financial or any other person, any former or present customer or identified prospect of United Financial for purposes of (1) inducing, soliciting, or advising the person to do business with United Financial, or any other provider of estate planning services that operates under a business model similar to that of United Financial, and/or (2) selling any additional financial products or services;

c. Engaging in any of the acts identified in the Verified Petition for which the IBSA contends constitute the unauthorized practice of law; and

d. With regard to the lawyers who entered into the agreements, Eads and Jackel, will not assist others in the unauthorized practice of law.

The settlement agreements were approved by the Indiana Supreme Court and Respondents Douglas Lalama, Linda Dishong (Christiano), L. Kay Larsen, Katherine Jackel and Andrew M. Eads dismissed from this cause of action on May 1, 2009 and May 8, 2009.

III. Motions Practice

37. The evidentiary hearing was held in this cause before the Commissioner on May 27, 28 and 29, 2009. Named Respondents and parties to this action

Jayne A. Follett, Sharon Dorsey, Sherry Jordan and Gary Lovelady did not appear for the evidentiary hearing.

38. The parties submitted their Proposed Findings of Fact to Commissioner Embrey on June 22, 2009.

39. The Commissioner is filing his Proposed Findings of Fact and Recommendations to the Indiana Supreme Court on July 13, 2009.

40. There were pretrial motions and responses on which the Commissioner ruled, one (1) by the ISBA and seven (7) by the UFSC Respondents. The following chart sets forth the filing dates of the motions, responses and replies, and the Commissioner's rulings on the motions in the course of these proceedings:

Pleading	Party	Filing Date	Ruling	Ruling Date
Motion to Indiana State Bar Association's Verified Petition by Interlineation to Include Claims for Aiding in the Unauthorized Practice of Law	ISBA	4/17/2009	Granted	5/18/2009

Motion to Amend UFSC Respondents' Verified Return by Interlineation to Include Affirmative Defenses	UFSC Resps	4/17/2009	Granted	5/18/2009
Motion to Bifurcate	UFSC Resps	4/9/2009	Motion withdrawn based upon parties' stipulation	5/18/2009
Brief in Support of Motion to Bifurcate	UFSC Resps	4/9/2009		
Response in Opposition to Motion to Bifurcate	ISBA	4/21/2009		
Reply to Response in Opposition to Motion to Bifurcate	UFSC Resps	4/30/2009		5/27/2009
Motion for Protective Order	UFSC Resps	4/9/2009	Information provided to be brought up to date + info on Thompson; otherwise granted	5/18/2009
Memorandum of Law in Support of the UFSC's Respondents' Motion for a Protective Order	UFSC Resps	4/9/2009		
Response in Opposition to Motion for Protective Order	ISBA	4/21/2009		

Reply Brief in Support of Motion for a Protective Order	UFSC Resps	4/29/2009		
Motion to Dismiss Certain UFSC Respondents	UFSC Resps	4/17/2009	Overruled	5/18/2009
UFSC Respondents' Memorandum of Law in Support of Motion to Dismiss Certain UFSC Respondents	UFSC Resps	4/17/2009		
Response in Opposition to Motion to Dismiss Certain Respondents	ISBA	4/27/2009		
Reply Brief in Support of Motion to Dismiss Certain UFSC Respondents	UFSC Resps	5/4/2009		
The UFSC Respondents' Motion to Dismiss or, in the Alternative, Motion to Strike	UFSC Resps	4/17/2009	Overruled and determined to be baseless	5/18/2009
Memorandum of Law in Support of the UFSC	UFSC Resps	4/17/2009		

Respondents' Motion to Dismiss, or, in the Alternative, Motion to Strike				
Response in Opposition to Motion to Dismiss or, in the Alternative, Motion to Strike	ISBA	4/27/2009		
Reply Brief in Support of Motion to Dismiss or, in the Alternative, Motion to Strike	UFSC Resps	5/4/2009		
UFSC Respondents' Motion in Limine to Exclude Testimony of Expert Witnesses	UFSC Resps	4/29/2009	Motion in Limine improper; testimony excluded at pretrial but allowed at the hearing	5/18/2009
Relator's Response in Opposition, and Motion to Strike, the UFSC Respondent's Motion in Limine to Exclude Testimony of Expert Witnesses	ISBA	5/4/2009		

Motion for Leave to File Reply Briefs	UFSC Resps	5/4/2009		
Petitioner's Objection to Motion for Leave to File Reply Briefs, or, in the Alternative, Petitioner's Motion to Strike	ISBA	5/11/2009	Argued; Not ruled upon	N/A
UFSC Respondents' Response to the ISBA's Objection/ Motion to Strike	UFSC Resps	5/15/2009		

41. In United Financial's Memorandum of Law In Support of the UFSC Respondents' Motion to Dismiss Or, In The Alternative Motion To Strike, counsel argued that the ISBA has a "personal interest in the outcome of the case." [p. 2] It was further asserted that the ISBA previously resolved UPL cases via "settlements [that] often take the form of a contribution to the ISBA," thus providing an incentive for the ISBA to arbitrarily file UPL cases and extract settlements. [p. 11] Counsel stated that "the settlements that defendants enter into in connections with Rule 24 charges often take the form of contributions to the ISBA and can amount to hundreds of thousands of dollars." [p. 15] This is not accurate and there was no factual basis for this argument.

42. Counsel for United Financial was advised of the inaccuracy and requested a written statement from Tom Pyrz, the Executive Director of the ISBA verifying such had never been done, which was provided.

43. Rather than correcting the record, counsel for United Financial attached a copy of a settlement proposal written by counsel for the ISBA to a pleading entitled Reply Brief In Support of Motion To Dismiss Or, In The Alternative, Motion to Strike and filed it with the Court. [Exhibit 1 to the Reply Brief] Therein counsel conceded that they had no evidence that the ISBA had received monetary benefit for settling any previous UPL case. [p. 6] Counsel justified publishing the settlement proposal by arguing that the ISBA "planned on the UFSC Respondents paying all costs of the proceedings, including ISBA's attorney fees, and it planned on receiving a substantial monetary 'contribution' from the UFSC Respondents on top of that." [p. 8] These allegations were made with no basis in fact.

44. The ISBA moved to have the settlement letter stricken from the record, citing Ind. Evidence R. 408.

45. Counsel for United Financial responded in a pleading entitled UFSC Respondents Response To The ISBA's Objection/Motion To Strike. Therein counsel wrongly interpret the settlement letter, alleging it proposes a dismissal of the case in exchange for a contribution to the ISBA. [p.5-6] Moreover, counsel

asserted that attaching the letter was "necessary to prevent the ISBA from asserting a fraud on the court," citing Prof. Cond. R. 3.3(b).

46. There was no basis for this claim. It is false and has no merit. The Commissioner advised counsel for the parties at the pre-hearing conference that he would find United Financial's claim to be baseless. As of this date, United Financial has not rectified the initial baseless allegation made against the ISBA. Instead, counsel twice offered into evidence the settlement letter without any legal or factual basis, and has not addressed in any way the baseless accusation that the ISBA endeavored to perpetrate a fraud on the Court.

47. The ISBA expended approximately $19,500 in attorney fees responding or otherwise dealing with this issue.

IV. Alleged Rule Violation

48. The ISBA charged the UFSC Respondents with violating Ind. Admission and Discipline Rule 24, Rules Governing the Unauthorized Practice of Law, the pertinent parts of which provides as follows:

> Original actions, under 33-2-3-1, to restrain or enjoin the unauthorized practice of law in this state may be brought in this court by the attorney general, the Indiana Supreme Court Disciplinary Commission, the Indiana State Bar Association or any duly authorized committee thereof, without leave

of court, and by any duly organized local bar association by leave of court. The action against any person, firm, association or corporation, shall be brought by verified petition, in the name of the state of Indiana, on the relation of the authorized person or association or committee, and shall charge specifically the acts constituting the unauthorized practice.

Within time allowed, a respondent may file a verified return showing any reason in law or fact why an injunction should not issue. No other pleading in behalf of a respondent will be entertained. All allegations of fact in the petition and return shall be specific and not by way of ultimate fact or conclusion. The return shall specifically deny or admit each allegation of fact in the petition, and it may allege new facts in mitigation or avoidance of the causes alleged in the petition.

The verified petition and return shall constitute the evidence upon which the issues are decided, unless the court shall deem it necessary to, and shall appoint, a commissioner, in which event such commissioner, who shall have full authority to subpoena witnesses and records, shall hear the evidence and report his findings of fact to the court.

A copy of any pertinent agreement, made by any recognized bar association concerning the unauthorized practice of law, may be

attached to and made a part of any pleading and unless denied under oath shall be deemed to be a true copy without further proof of the execution thereof.

The costs and expenses incurred by such hearing shall be borne by the losing party. Briefs need not conform to requirements of Appellate Rules 43-48. Arguments will not be heard as of right.

Adopted Oct. 21, 1952; renumbered June 23, 1971; readopted April 24, 1973, effective June 23, 1971.

V. Relief Requested

49. In the Verified Petition, the ISBA set forth the following requests for this Court:

a. That United Financial and its representatives/employees/agents be permanently enjoined from engaging in the unauthorized practice of law in the State of Indiana;

b. That the Respondents named herein be permanently enjoined from engaging in the unauthorized practice of law in the State of Indiana;

c. That the Court order the disgorgement of fees and reimbursement of funds collected by United Financial to the appropriate persons(s) named in each of the counts specifically set forth in this petition;

d. If the Court deems it appropriate, that United Financial be ordered to disclose the names and addresses of all representatives/employees/agents of United Financial who have operated on behalf of United Financial within the state of Indiana for the purpose of identifying those individuals engaged in this business and ensuring that they are enjoined from engaging in the unauthorized practice of law;

e. If the Court deems it appropriate, that United Financial be ordered to disclose the names and addresses of all clients within the State of Indiana, for whom United Financial sold a Will, Trust or Estate Plan, for the purpose of advising those persons of the Court's order;

f. If the Court deems it appropriate, that the Court order the disgorgement of all fees collected by United Financial within the State of Indiana in order to reimburse the appropriate persons; and

g. That this Court grant all other relief deemed appropriate pursuant to the Court's rules.

VI. Facts Common To All Counts

50. This Court has exclusive and original jurisdiction over matters which involve the unauthorized practice of law. Art. 7, § 4, Constitution of Indiana, I.C. § 33-24-1-2, *Admission and Discipline Rule 24.* [Stipulation of Facts ¶1]

51. Relator, the ISBA, has express authority to bring this action seeking to enjoin the unauthorized practice of law pursuant to Admission and Discipline Rule 24. [Stipulation of Facts ¶1]

52. Rule 24 allowed the United Financial Respondents an opportunity to set forth in detail their reply to the charges levied by the petition. The respondent "shall specifically deny or admit each allegation of fact in the petition and may allege new facts in mitigation or avoidance of the causes alleged in the petition." The Court may rule on the pleadings.

53. The ISBA filed a detailed petition, with every allegation supported by either a document or an affidavit. United Financial filed a lengthy response, attached to which were numerous supporting documents and several affidavits. These pleadings and all supporting evidence have been relied upon by the Commissioner in preparing these findings, as the parties allowed by stipulation.

54. The ISBA's allegations were premised upon the documents on hand which reflected United Financial's business model prior to 2009. In the return, rather than specifically admitting or denying many of the allegations, UFSC employed an approach whereby the company explained and attempted to justify its current business plan, which it believes corrects the UPL problems it impliedly admits in the response to Relator's complaint. While the rule permits a respondent to allege new facts in mitigation or avoidance of the allegation in the petition, it was incumbent upon

United Financial to also specifically admit or deny the allegations. The return does not outright admit or deny one of the central issues, whether or not United Financial markets and then sells wills and trusts.

55. United Financial's Return is a clear effort to redirect the theory of the case brought by the ISBA to focus on the present, by not responding directly to the allegations about the past practices. In many instances, an admission or denial was in order, but was not forthcoming. The Commissioner asked counsel for the company directly in the course of the pre-hearing conference if the Return could not be read as an admission that United Financial's past practices constituted UPL, to which counsel generally agreed, although somewhat equivocally.

56. United Financial avoided specifically responding to these allegations in the return, repeating the assertion in various ways that United Financial's representative "do not market and sell estate plans." [See Return ¶s 3,26,27,30,37,43,46,51,61]

57. This mantra was repeated, although not with total success, at the hearing in the course of the testimony of Jody Waugh [Tr. 269-272, 276, 278, 322-25], Richard Follett [Tr. 533, 536, 566], and Rich Follett [Tr. 588-592].

58. United Financial has since 1995, and at least until immediately before the hearing, marketed and sold estate planning services, including wills and trusts. This was true at the time the Return was prepared and United Financial's position in this regard

is not reconcilable with the evidence in the ISBA's Petition or the evidence at the hearing.

59. In thirty-one (31) months (October 2006 to May 2009) the company grossed in excess of $ 29,000,000 from all of its revenue sources in every state. In excess of $2,700,000 was from the sale of estate plans in Indiana. The company's gross revenue exceeded $ 935,000 per month during this period.

A. The United Financial Team

60. United Financial, a corporation organized under the laws of the State of Indiana since 1982, claims to provide "suitable estate & financial planning solutions" for its customers. Specifically, United Financial professes that it provides the following services:

- Asset protection and preservation
- Estate tax elimination or reduction
- Wealth and estate transfer planning
- Individual and family trust planning
- Planning for disability and long-term care
- Planning for guardianship of minors and educational funding
- Income tax, Social Security, Medicare, Medicaid and capital gains tax planning [Printout from United Financial website (www.unitedfin.com) – "About Us," ISBA Exhibit 1, and "Introduction to: United Financial Systems,

Corp.," ISBA Exhibit 2][1] [Stipulation of Facts ¶3]

61. United Financial also advertises that it provides "creative solutions to common estate and financial planning issues facing a maturing America" and sells estate planning documents including wills, trusts, powers of attorney and sells insurance products including annuities. [2005 Mission Statement, ISBA Exhibit 2, p. 797] [Stipulation of Fact ¶23] [*See also* www.unitedfin.com]

62. United Financial displays the following disclaimer on its website:

> United Financial Systems, Corporation is not engaged in the practice of law and is not a lawyer or a law firm. This Web site is intended for general information purposes only and does not and is not intended to constitute legal, tax or investment advice. The reader should consult with legal or tax advisors to determine whether the information set forth herein is applicable to, and in the best interests of, the reader. The reader is cautioned that laws related to estate planning change from time to time, and that consulting with an attorney on a regular

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[1] Some of the Exhibits have multiple numbers on the pages. In referring to those exhibits, the page numbers used herein direct the reader to the number located in the lower right-hand corner of the page. Citations to depositions refer to the page number of the transcript.

> basis regarding the reader's estate plan is a prudent and wise step to take.

[ISBA Exhibit 1; Printout from United Financial website (www.unitedfin.com) – Disclaimer, ISBA Exhibit 6]

63. Until August, 2008, United Financial's principals were Richard Follett ("Dick Follett"), President/Treasurer, and Jayne Follett, Vice-President/Secretary and its Directors were Dick Follett, Chairman of the Board; and Jayne A. Follett, Chief Financial Officer. Prior to December 31, 2008, United Financial's sole shareholder was the Jayne A. Follett Family Limited Partnership. [Minutes of the Annual Meeting of the Board of Directors of UFSC, dated May 20, 2005, ISBA Exhibit 3; J Follett depo 7:7-13; 18; 19 to 20:1] Jayne Follett resigned from her office positions and from the Board of Directors on August 27, 2008, after the filing of the Verified Petition. [UFSC Exhibit 3] [Stipulation of Facts ¶4]

64. Presently, United Financial is owned by United Financial Resources, which entity is held by the Jayne A. Follett Family Limited Partnership (the "Family Limited Partnership"). [Tr. 544:2-6] The members of the Family Limited Partnership include Dick Follett, Jane Follett, Richard L. Follett II ("Rich Follett"), Beau Follett, and James K. Boyles. [Tr. 546:13-15] In addition to United Financial, the Family Limited Partnership owns Access One, Incorporated and Alliance America Corporation, which both market insurance products. [Tr. 544:7-21]

65. In 2004, United Financial's home office senior management included: Dick Follett, Jayne A. Follett, Rich Follett, Beau R. Follett, James K. Boyles, Raymond C. Phillips, Gary Lovelady, Sharon Dorsey and Sherry Jordan. Gary Lovelady left his position as Vice President, Estate Planning Division in March 2006. [Home Office Senior Management, ISBA Exhibit 4; Stipulations of Facts ¶5]

66. Jody Waugh ("Waugh") was an EPA and EPA Area Director in Indiana during the period from October 2001 to December 2008. [Stipulation of Fact ¶6]

67. At time periods relevant to the issues set forth herein, Raymond C. Phillips ("Phillips") was a Financial Services Division Vice President and an FPA for United Financial. [Stipulation of Fact ¶7]

68. At time periods relevant to the issues set forth herein, Linda Dishong (now Linda Christiano) ("Dishong") was an EPA for United Financial. [Stipulation of Fact ¶8]

69. At time periods relevant to the issues set forth herein, L. Kay Larsen ("Larsen") was an FPA for United Financial. [Stipulation of Fact ¶9]

70. At time periods relevant to the issues set forth herein, James Boyles ("Boyles") was the Director of Administration and an EPA for United Financial. [Stipulation of Fact ¶10]

71. At time periods relevant to the issues set forth herein, Richard L. Follett, II ("Rich Follett") was

a National Sales Director for United Financial. [Stipulation of Fact ¶11]

72. At time periods relevant to the issues set forth herein, Beau R. Follett ("Beau Follett") was a National Sales Director for United Financial. [Stipulation of Fact ¶12]

73. At time periods relevant to the issues set forth herein, Gary Lovelady ("Lovelady") was Estate Planning Division Vice President for United Financial. [Stipulation of Fact ¶13]

74. Sharon Dorsey ("Dorsey") was Vice President, Marketing Administration from July 2003 until November 2006 and Vice President, Human Resources and Administration from December 2006 to December 2008. [Stipulations of Fact ¶14]

75. Sherry Jordan ("Jordan") is United Financial's Vice President of New Business and Contracting. [Stipulations of Fact ¶15; UFSC Exhibit 147]

76. At time periods relevant to the issues set forth herein, Douglas J. Lalama ("Lalama") was an FPA for United Financial. [Stipulation of Fact ¶16]

77. Andrew Mark Eads ("Eads") performed legal work for United Financial from August 2000 to May 2005. [See, Eads Independent Contractor's Agreement, ISBA Exhibit 9, Eads deposition, ISBA Exhibit 10 pages 9:6-12, 10:3-11:1, 15:12-20, 32:21 to 33:6] [Stipulations of Fact ¶17]

78. Katie Jackel ("Jackel") performed legal work for United Financial from June 1999 to March 2000, and from December 2002 to April 2006, while she was an attorney licensed to practice law in the State of Indiana. [See, Katie Jackel Deposition, ISBA Exhibit 11 pp. 10:15-19, 13:1-4, 36:1-5; Katie Jackel Affidavit, ISBA Exhibit 12, ¶¶ 3, 4, 6, 20; Katie Jackel Independent Contractor Agreement, UFSC Exhibit 10; Stipulations of Fact ¶18]

79. John M. Joyce ("Joyce") was hired by United Financial as an independent contractor attorney in February 2000. [See, John M. Joyce Roll of Attorneys Printout, UFSC Exhibit 11; John M. Joyce Affidavit, UFSC Exhibit 12; John M. Joyce Independent Contractor Agreement, UFSC Exhibit 13; Stipulations of Fact ¶19]

80. Phillips, Waugh, Lalama, Dick Follett, Jayne A. Follett, Rich Follett, Beau Follett, Lovelady, Jordan, Dishong, Larsen and Boyles are not, and have never been, licensed Indiana attorneys. [Darla T. Little Affidavit, ISBA Exhibit 5 at paragraph 3; Stipulations of Fact ¶20]

81. In addition to the home office senior management, United Financial consists of: EPAs, FPAs and Panel Attorneys, some of whom are identified herein. The estate plans marketed, sold and prepared by United Financial typically involve the participation of people in each of these roles, as more specifically set forth herein.

82. United Financial's marketing materials reference the United Financial "team." Although these materials advertise that United Financial will provide its clients with access to " . . . independent attorneys, financial consultants, insurance specialists, tax strategists, Medicaid planning, and even estate planning assistants", neither Waugh, who has been with United Financial since 2001 and is currently sales manager for the state of Florida, nor Dick Follett, the company's President, could identify a single individual on the United Financial team who provides tax strategy services to United Financial's customers. Other representatives of United Financial could not identify any tax strategists on the United Financial team. [Tr. 281:15-22; 282:8-13; 283:14-17; 287:6-19; 288-4:14; 317: 21-318:8; 548:8-549:6; 613:22-614:15; 615:18-23] Such person does not exist and the lack of tax planning was detrimental to Robert Nesbitt and Ruth Springer as later set forth herein at paragraphs 170 and 150.

B. Meeting Clients and Selling Estate Planning Documents – Estate Planning Assistants

83. United Financial sends out informational postcards to potential customers, primarily targeting people who are retired or nearing retirement, in an effort to pique their interest in United Financial's products and services. The postcards promise free information as to how to save money in federal estate taxes and avoid the costs and delays associated with

probate. Recipients of the postcards who would like to receive the free information fill in contact information and return the cards to United Financial. [See, United Financial Sample Postcard (2006), ISBA Exhibit 7; Tr. 541:22-542:7]

84. United Financial spends "literally millions of dollars each year on direct mail solicitation" and delivers the contact information to its EPAs/HPAs, calling them "leads". [United Financial's Procedures Manual for Estate Planning Assistance, ISBA Exhibit 8, p. 1538; Tr. 541:1-12]

85. The EPAs/HPAs, using the sales leads provided by United Financial, contact prospective clients for the purpose of marketing and selling an estate plan, which may include a will, trust, power of attorney, deed(s) and/or a living will. The EPAs/HPAs named parties hereto are not licensed to practice law in the state of Indiana.

86. EPAs/HPAs are, for the most part, trained in a four (4) day program by United Financial. United Financial has a procedures manual for EPAs/HPAs. ISBA Exhibit 8 is a copy of the EPA/HPA procedures manual and slide presentation used to train those who market and sell United Financial's estate plans. The topics covered during the course of this program include: an introduction to estate planning and the living trust, an introduction to the EPA/HPA administrative process, and the introduction to the EPA/HPA sales process and presentation. Notably, the EPAs/HPAs are instructed:

a. That probate is bad and revocable living trusts are good;

b. Probate is very expensive, and certainly more expensive than a living trust;

c. Probate takes an average of 6-24 months to complete;

d. Probate causes stress to heirs;

e. Probate is a matter of public record and therefore reveals personal information to the public;

f. The family loses control of the estate during probate; and

g. How to avoid the probate system.

[ISBA Exhibit 8, pp. 1603-1606; Tr. 297:15-23; 299:7-14; 309:11-16]

87. The EPAs/HPAs are told that United Financial is in the estate preservation business. United Financial facilitates estate preservation by "educating" its clients about the need for estate planning. United Financial teaches that probate should be avoided because it is lengthy, costly, and emotionally difficult and one's financial information will be made public through court records. EPAs/HPAs are taught that a Living Trust will allow the family to pass an estate to heirs without "the intervention by legal authorities (probate)." The EPAs/HPAs are also taught the mechanics of a living trust and the importance of the fact that the trusts must be funded and that "all too often today, Living Trusts are drawn up but not

funded with the assets." The EPA/HPA is taught about estate planning documents beyond the Will and Trust, such as a Durable Power of Attorney, a Living Will, a Healthcare Power of Attorney. [ISBA Exhibit 8, pp. 1414, 1417-1421, 1432]

88. The EPAs/HPAs are provided information about the unauthorized practice of law and consumer protection statutes. Specifically, they are told that the key "is to not apply any legal principles to a client's specific circumstances." The stated "goal is to educate, not advise." [ISBA Exhibit 8, p. 1473-74].

89. Despite these admonitions against behavior amounting to the unauthorized practice of law, the EPAs/HPAs are compensated on a commission-only basis and are motivated to sell the estate plans provided by United Financial. Mr. Waugh and Dick Follett testified that an EPA's/HPA's goal when meeting a new customer is merely to "educate" rather than make a sale of an estate plan. Mr. Waugh has a 10th grade education and what he knows about probate matters he learned within the context of sales. The education provided by United Financial is entirely one-sided and delivered in such a way so as to likely alarm the customer. Despite referring to his presentation as "educational", Mr. Waugh uses a sales term, "soft-close" to describe the final segment of his presentations to potential clients and admits that he does sell, and is a "great salesman." Further, Dishong characterized her only responsibility to United Financial as "[j]ust sell and bring the applications in." Even Lalama, an FPA, recognizes that the EPAs who

did not sell successfully "didn't stay around very long."[2] [Tr. 248:5-8; 269:9-270:22; 277:22-24; 278:9-13; 297:17-298:15; 299:7-14; 408:20-21; 536:2-17]

90. One of the exhibits, Exhibit 33A, is a sales training tape of a session conducted by Jody Waugh. Listening to this tape provides significant insight into the sales method of United Financial. It is calculated to scare the recipient of the presentation into believing the probate process could completely destroy personal and family privacy and burden one's heirs and beneficiaries with substantial costs. The sales presentation grossly exaggerates and affirmatively misrepresents, the length, burden and expense of the probate process. The presentation is what must be characterized as a hard sell, and does not accurately portray the probate system. [Tr. 27-34]

91. From 1995 to 2000 the fee charged by United Financial for a basic Living Trust plan was $1,995; from 2000 to 2008 the fee charged by United Financial for a basic Living Trust plan was $2,495, and in 2009, the fee for the basic Living Trust plan was $2,695.00. The fee for the preparation of a Will or basic estate plan from 1995 to 2007 was $695 and was increased to $1,245.00 in 2008. [ISBA Exhibit 8, p.1575; Stipulations of Fact ¶29]

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[2] The Commissioner has listened to Mr. Waugh's presentation used for training, provided on a CD and marked as Exhibit 33.

92. The EPA/HPA is expected to make sales based upon the number of leads provided by United Financial in a ratio of 40 to 1. For each sale by an EPA/HPA in a given week, the EPA/HPA receives $750. For any second or subsequent qualifying sale, the EPA/HPA is paid $900. [ISBA Exhibit 8, pp. 1541, 1584]

93. The EPAs/HPAs are provided training in the sales process, instructed in techniques, "warm-up questions," listening, caring and attitude. The goal of the EPA/HPA is to meet with the prospective clients and ask about their present estate plan, whether they have a trust or will and sell an estate plan in the course of that meeting. [ISBA Exhibit 8, pp. 1593-1595]

94. Techniques suggested by United Financial include the use of drawings to visually enhance the presentation. These diagrams suggest that the United Financial trust plan is more advantageous for the client than a simple will because it eliminates the cost of probate or guardianship. The diagrams indicate that a will results in probate, which is slow, controlled by the court, stressful, costly and a part of the public record. The United Financial Trust, on the other hand, results in the reduction or elimination of taxes, is private and controlled by the family, without probate, and take days or weeks to wind up. A copy of a 2004 drawing is located at ISBA Exhibit 8, p. 1596, 1603-1606.

95. The EPA/HPA requests that the client provide detailed financial information about the client's

assets and answer questions regarding the client's current estate plan. This information is recorded on a document referred to as a Personal and Financial Organizer. The information includes questions about the client's heirs and other details a lawyer would seek for preparing an estate plan. A sample Personal and Financial Organizer is attached to the Verified Petition as Exhibit 8, pp. 1607-1608.

96. The EPA/HPA is trained how to close the sale, and encouraged to "ask for the check." The Training Manual instructs the EPA/HPA how to handle the customers' objections, such as a protest to the price of United Financial estate planning services, requests to "think it over", the client's "need to discuss this with my children", and/or the need to talk to a lawyer, which the materials characterized as "by far the most frustrating objection." [ISBA Exhibit 8, pp. 1609-1621]

97. If the client agrees to purchase an estate plan offered by United Financial, the EPA/HPA accepts all or a part of the fee for the estate plan and the customer's financial information is returned to the office of United Financial. [Tr. 188:5-18]

98. There is no attorney involved during the meeting between the EPA/HPA and the client, and there is no attorney supervision of the EPA/HPA. The EPA/HPA does not report directly to an attorney before making sales calls and does not schedule the appointments according to an attorney's availability

to answer questions. The EPA/HPA determines what product to sell, after discussing estate planning, wills and probate with the client, and returns to United Financial with the client's personal information and a check for either a portion or the entire fee for the estate plan that the client selects at the meeting with the EPA/HPA. Further, the EPA/HPA will answer the client's questions about the various estate planning mechanisms. [Tr. 291:4-11; 409:15-410:5; 411:9-22]

99. United Financial loses money on the EPAs/HPAs because the cost of developing leads is greater than the profits from the from the EPAs'/HPAs sales. [Tr. 420:14-20] However, the EPAs/HPAs generate profits for the company by the sale of annuities and other insurance products sold to fund the trust. FPAs are in a confidential relationship with clients after the delivery of legal documents, the time when profitable sales are generated.

C. Drafting Estate Planning Documents – Panel Attorneys

100. The following licensed Indiana attorneys, referred to by United Financial as "Panel Attorneys", have at some point participated in document preparation for United Financial using information gathered by the EPAs/HPAs: Steve Heining, Nancy Lanier,

Andrew Eads, Katie Jackel, Mr. Googasian, and John Joyce.[3] These attorneys were purportedly engaged to:

> ▪ prepare various estate planning documents, including will, trusts, declarations, deeds and other related documents for [United Financial] on behalf of it(s) client . . . use his/her best efforts, skill and judgment in the performance of services on behalf of [United Financial] clients . . . provide legally sufficient documents for [United Financial] on behalf of its client(s) based upon the information contained in the form entitled "Personal and Financial Organizer", . . . prepare and gather information, make contact with the client, explain matters in sufficient detail to allow the client to make informed decisions and safeguard the client's confidences.

[Sample Independent Contractor Agreement signed by Andrew Eads, ISBA Exhibit 9].[4]

101. The Panel Attorneys are paid for their preparation of various estate planning documents by United Financial pursuant to a schedule provided by

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[3] Mr. Heining is deceased and it is believed Ms. Lanier left Indiana and could not be located. They are not named respondents herein.

[4] Although in the independent contactor agreement attached hereto, United Financial is defined as a company "which provides for the sale and service of various investment products and investment services." The company's mission statement states United Financial's business as providing creative solutions to common estate and financial planning issues facing a maturing America." [ISBA Exhibit 2, p. 797]

United Financial. Prior to October, 2006, the Panel Attorneys received $225.00 for preparing the living trust document package, $25.00 for preparing deeds, if not included in the package, $75.00 for an irrevocable life insurance trust, $75.00 for a last will and testament package and $25.00 for an initial review fee in which she or he determined no additional estate planning documents would benefit that particular client. As of January, 2008, the Panel Attorney received $225.00 for preparing any type of estate plan and $25.00 for conducting an initial review in which he or she determined that no additional estate planning documents would benefit the client. The disproportionate payment (EPAs receive $750 and $900 for selling a trust service and the attorneys are paid $225 for preparing the documents) demonstrates that this entire scheme is about sales and revenue for UFSC, not about providing objective, disinterested analysis of the needs of a client by an independent attorney. [ISBA Exhibit 9, p. 861; Stipulations of Fact ¶38, ¶97]

102. Although Mr. Joyce has clients other than those assigned to him by United Financial, United Financial clients make up the bulk of Mr. Joyce's legal practice. [Tr. 692:13-22]

103. Eads believed that United Financial "did sell Living Trusts, they did do certain other investments like . . . annuities and insurance. [And, that United Financial] had some insurance products."

[Andrew Eads Deposition, August 7, 2008, ISBA Exhibit 10, p. 15:2-11][5]

104. According to Eads, an EPA was merely a salesperson who would speak with a client and get basic information. The EPA would fill out a Personal and Financial Organizer which contained general information about who the client wanted to appoint as co-trustee or power of attorney, identifying the beneficiaries and generally list their assets and worth. [Exhibit 10, pp. 17:3-18:19; Stipulations of Fact ¶41]

105. Following his review of the information, if Eads believed that the information "looked good on paper" he would follow up on the EPA's work by contacting the client to speak with him or her by telephone. If in Eads' opinion, the person did not need estate planning, he would tell Richard Follett. However, Eads was uncertain as to what happened in those instances thereafter. [ISBA Exhibit 10, p. 19:7-16]

106. Eads had a standard set of questions for clients. He would confirm the name and general data, confirm their beneficiaries, and ask whether the client had any prior estate planning in place. Further, he would usually ask if the client understood a living

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[5] Andrew Eads was deposed in the course of litigation filed by Ruth I. Springer against United Financial, Raymond C. Phillips, Andrew Eads, Jody L. Waugh, Douglas J. Lalama, Richard L. Follett and Jayne A. Follett. His deposition has been marked as ISBA Exhibit 10.

trust and had any questions to ask of him. [ISBA Exhibit 10, p. 20:1-21]

107. Eads believed that, "if the client wanted to get some estate planning done, then they [the EPA] would take all this financial information that's on that Personal and Financial Organizer." [ISBA Exhibit 10, p. 26:7-21; Stipulations of Fact ¶44]

108. The majority of the clients with whom Eads dealt at United Financial purchased revocable living trusts as opposed to a simple will package. He estimated 85% of the clients for whom he prepared documents ordered the trust package, for which they were charged $2,495.00. [ISBA Exhibit 10, pp. 28:9-29:20]

109. Eads would prepare the package, including the documents, and tender it to a United Financial staff person to be bound. [ISBA Exhibit 10, p.33:2-6]

110. Eads' office was located within the offices of United Financial. He used United Financial's computer to generate documents and when he left the company's employ, he took with him copies of the documents he generated but left his work product on United Financial's computer. [ISBA Exhibit 10, pp. 52:4-53:6]

111. According to Katie Jackel ("Jackel"), another Panel Attorney for United Financial, "it was not standard procedure to meet with a client unless

they asked to meet with the attorney. They met in person with other people besides the attorney."[6] Mr. Joyce testified that he did not regularly meet with his United Financial clients face to face. [Katie Jackel Deposition, April 12, 2006, ISBA Exhibit 11, pp. 13:19-14: 3; Tr. 683:16-684:6]

112. In preparing the estate planning documents for clients of United Financial, Jackel would use legal documents and forms provided by United Financial. Jackel shared these forms with other Panel Attorneys, including Joyce. A comparison of the estate planning documents prepared for Mr. Nesbitt in 2003 and Ms. Thompson in 2008 demonstrates that the Panel Attorneys were still using the same forms in 2008 as those originally provided to Jackel by United Financial. [Katie Jackel Affidavit, ISBA Exhibit 12, ¶¶ 3-4; Tr. 119:24-25; 196:5-12; 678:9-19] The comparison is as follows:

Robert K. Nesbitt estate planning documents Prepared by Katie Jackel Dated: August 27, 2003	Leanna Rae Thompson estate planning documents Prepared by John Joyce Dated: November 10, 2008
Cover – identical other than Jackel prepared for Nesbitt	**Cover** – identical other than Joyce prepared for Thompson
All pages not mentioned appear to be identical.	

[6] Katie Jackel was deposed in the course of the lawsuit filed by Robert Nesbitt against United Financial Systems Corporation, L. Kay Larsen, Katie Jackel and Betty Maddux. Her deposition has been marked as ISBA Exhibit 11.

Section 1 Instructions . . . – cover page identical; ¶ 3 is different. Thompson's is titled Mortgages; Nesbitt's-Deeds of Trust; all other paragraphs similar.
P. 6, Summarization of Trust – Appear identical
P. 8 Article VI – Trustee's powers – Item W has been added to Thompson – power to plan for government aid.
Last Wills and Testaments – Page 18 of both wills. The font is Times New Roman and single spacing has not changed in 5 years. It does appear Thompson's has a smaller font. Otherwise, these documents are identical with exception of the individual Testator and individual heirs.
Acknowledgment – This has changed a bit. There are numbered paragraphs in Thompson's
Trust Agreement – p. 23 Article II, Paragraph B has additional language in Thompson's; p. 24, Article III, subparagraph C-additional language in Thompson's under Distribution of Principal; p. 27 in Thompson's is an additional page regarding distribution to incapacitated or disabled beneficiary. **Entire remainder appears nearly identical** – 36/37 pages
Certificate page – same
Notarization page – same
Declaration of Intent (P. 40/41) – Same Same blank pages Schedule A to Declaration of Intent
Minutes of Trust (46/47) – same
Abstract of Trust (50/51) – same

Durable Power of Attorney (56/57) – Article II, Statement of Authority granted, the IC Codes are updated in Thompson's and (D) Retirement is added in Thompson's; everything else identical
Durable Power of Attorney for Health Care (62/63) – In Thompson's at page 66 – there is an additional page entitled "authorization for release of protected health information" – otherwise same language
Living Will Declaration (67/69) – same language

113. Additionally, the cover letters to the FPAs from the Panel Attorneys regarding the execution of the estate planning documents are form letters provided by United Financial. [Tr. 681:4-19; 682:20-683:11]

114. Jackel believed that "the estate planning agents are the individuals who go to the client's home, talk to them about various documents." It was her understanding that the EPA finds out the estate planning needs of the client. The EPA would sell either the will or the trust package to the client and then convey this information to the Panel Attorneys, who would then speak with the clients. There were times when the clients did not understand what package they were purchasing and it may have been changed after they spoke with one of the Panel Attorneys. [ISBA Exhibit 11, pp. 15:2-4; 16:24-17:1; 63:20-64:9; Stipulations of Fact ¶50]

115. In some instances the clients paid in full for the package that had been determined

appropriate for the client during the meeting with the EPA and before the client had any conversation with a lawyer. At other times, the EPA collected only a partial fee. [ISBA Exhibit 11, pp. 67:8-68:25]

116. Jackel and the other Panel Attorneys did not meet the clients to review and discuss the documents each had prepared. The FPA's role at United Financial was to deliver the documents to the client, at which time they were to be executed. It was the FPA's job to explain the relevance and purpose of the documents to the client and otherwise answer their questions. Legal questions were to be directed to the panel attorney who prepared the documents. Although a Panel Attorney can earn a nominal fee from United Financial for delivering estate planning documents to the client, the amount of the fee provides little incentive for the Panel Attorney to do so. Mr. Joyce, for instance has never delivered an estate plan that he drafted through United Financial. Even when Mr. Joyce was concerned about the possibility of incompetency affecting the enforceability of the estate plan he drafted for one client, he delegated the responsibility of looking for a sign of incompetency to the FPA who delivered the documents. [ISBA Exhibit 11, pp. 88:14-89:5; Tr. 690:5-15; 695:16-696:12]

D. Execution of the Documents and Funding Trusts – Financial Planning Assistants

117. The FPAs, like the EPAs/HPAs, are provided training by United Financial. ISBA Exhibit 13 is a copy of United Financial's Procedures Manual for FPAs. Once estate planning documents are completed, the documents are provided to a FPA for delivery to the client by one of the company officials. The FPAs are compensated only by direct commission from each of the insurance carriers for which the FPA writes business. [ISBA Exhibit 13, pp. 855, 879]

118. The FPAs "are the persons who deliver and fund the revocable living trusts produced by the attorney associated with United Financial . . . " The FPA is authorized by United Financial to review the trust before scheduling an appointment with the client to determine if they "need to discuss anything with the client – i.e. missing deeds or incorrectly spelled names." [ISBA Exhibit 13, p. 881; Stipulations of Facts ¶54]

119. Currently, the FPA is assigned clients for delivery of estate planning documents by the home office, and though it has not always been the case, the FPA sets up a follow-up appointment in which to make a sales call rather than giving the sales pitch on the date of the execution of the estate planning documents.

120. As part of their training from United Financial, the FPAs are provided information to

identify the ways to convert the client's assets to annuity and life products, which when sold by the FPA, results in a sales commission. An FPA receives a summary of each client's assets and financial information from United Financial before the FPA delivers the estate planning documents. [Stipulations of Fact ¶59; Tr. 232:1-5]

121. Regarding the FPA's delivery of estate plans for execution, United Financial trains FPAs to "warm-up just as if you were making a sales presentation – which you are. You may even have to resell the benefits of the trust. Do what you need to do." [See, 2004 Financial Planning Assistance Procedure Manual, ISBA Exhibit 13, p. 882; Stipulations of Fact ¶55]

122. FPAs are specifically instructed how to fund a living trust. "[T]he proper funding of their living trust is one of the most important tasks you will perform. It is the client's responsibility to fund their trust, but they often need your help." The FPA was advised to review the living trust with the client and explain how the client's personal possessions should all be placed in the trust. [ISBA Exhibit 13, p. 885; Stipulations of Fact ¶56]

123. FPAs do not regularly contact the Panel Attorney who drafted the documents that the FPA will deliver before the FPA makes the delivery [Tr. 232:17-21] and Panel Attorneys do not regularly contact FPAs. The communication between them is primarily by way of the letter provided by the Panel

Attorney which instructs the FPA how to carry out the execution of the documents.

124. The FPAs explain the legal significance and purpose of each estate planning document to the client sand tell them how to execute the documents. [Tr. 234:22-24; 249:9-18]

125. Lalama testified that clients always had questions when he delivered estate planning documents, noting that "you can't go through a document that is 60 to 70 pages long with people who, you know, do not have technical expertise in that and have them completely understand what's going on. So, you know, the whole purpose was to have them, you know, understand it well enough to sign the document." [Tr. 249:9-18] Mr. Lalama could not recall an instance when he had called a Panel Attorney to assist in answering a client question. [TR.249:19-22]

126. Mr. Waugh recognized that a trust will only fulfill the purpose of avoiding probate if it is properly executed. United Financial leaves this crucial final step in the hands of the FPAs. [Tr. 270:20-22]

127. FPAs are instructed to resell the trust, or the benefits thereof, when a client has reservations. At the time of signing, no attorney guides the FPA regarding the benefits of the trust when a resell pitch is made to the client. [Tr. 260:2-15]

128. Upon completion of the trust delivery and funding, the FPA prepares a document entitled

"Delivery Transmittal". The Delivery Transmittal includes a checklist for execution of the estate planning documents which seeks the FPA's opinion as to whether or not the client "completely understands the process and importance of funding the trust" and as to whether the client was a candidate "for another type of sale." [ISBA Exhibit 13, p. 893]

129. United Financial expects FPAs to meet sales quotas. For instance, in 2004, the goal was to generate an average of $75,000 per week in annuity or life premium sales. Over time, FPAs are expected to increase their production level. Lalama testified that that the FPAs were motivated to sell annuities so they could make money and that he knew of several individuals (including Kay Larsen, Mike Cooper, and Ray Phillips, who conducts FPA training for United Financial) who had sold annuities in amounts greater than those recommended by United Financial's sales guidelines. [ISBA Exhibit 13, p. 855; Stipulations of Fact ¶57; Tr. 241:5-13; 242:18-24]

130. An FPA is compensated by receiving a nominal delivery fee of $75 for each trust delivered and $40 for each will delivered. They received no separate allowance for expenses and/or mileage. [ISBA Exhibit 13, p. 879; Stipulations of Fact ¶58]

E. Changes to the United Financial Business Model Since the Filing of the Verified Petition

131. United Financial has gone to great lengths to demonstrate that it has changed its business model in the months following the filing of the Verified Petition. However, despite the relabeling of various players on the United Financial "team", it markets and sells substantially the same products and/or services, and its agents provide the same legal advice to Indiana residents that they did prior to January of 2009.

132. Despite the insistence of United Financial that it has changed its business model, and significantly only in Indiana, the following factors persist:

a. United Financial still sells estate planning documents. As late as May 1, 2009, two sales in the amount of $2,695 each were documented by United Financial. Additional sales may have occurred since this date. The HPAs, which replaced the EPA position in the United Financial business scheme, is trained to sell supplemental Medicare insurance as well as the estate planning services originally sold by EPAs. [Tr. 273: 5-275:16; ISBA Exhibit 24]

b. Although Mr. Waugh is not in charge of training all HPAs, he trains HPAs in Florida, signaling, that Mr. Waugh's high-pressure sales tactics are still approved by United

Financial and taught by the company. [Tr. 265:13-21; ISBA Exhibit 31]

c. An attorney is not present during an HPA's sales pitch and the HPA is not acting under the direction of an attorney when making house calls to perspective clients, just as an EPA did not act at the direction of an attorney.

d. An attorney is in no way involved with the client until *after* some or all of the money for the legal services is collected by the HPA, just as with the prior system using EPAs.

e. The information collected by an HPA is subject to neither the attorney-client privilege nor the attorney-client confidentiality. In essence, the client unwittingly waives the privilege and the confidentiality of their information *before* the attorney-client relationship is consummated.

f. The Panel Attorneys are still hired and paid by United Financial rather than the client. Unlike a situation in which an insurance company hires an attorney for its client, the Panel Attorney does not represent United Financial, but only the client. Thus, there is no alignment of the interests of the client and United Financial.

g. United Financial still relies on the Panel Attorneys to conduct the conflict checks when new clients are assigned to them. Mr. Joyce's conflict check consists of his "checking as best I can with . . . each

individual name." Thus, if a Panel Attorney does have a conflict against representing a particular client, the Panel Attorney will not be apprised of that conflict until *after* he or she receives the client's Personal and Financial Organizer, containing sensitive financial information. [Tr. 693:13-18]

h. The FPA still delivers the estate planning documents to the client. Thus, to the extent any attorney-client privilege or duty of confidentiality exists between the Panel Attorney and the United Financial client, once the client is assigned to the Panel Attorney, both are destroyed as they relate to the information contained in the estate planning documents.

i. A Panel Attorney has little incentive to deliver the estate planning documents to the United Financial client. As a result, the Panel Attorney has no opportunity to observe the client, to determine competency, and assist in the review, and/or discussion and proper execution of the estate planning documents. Consequently, the Panel Attorney is unlikely to be able to testify as to what occurred at the time of execution if the estate plan is contested.

j. It is still a rare occurrence for a Panel Attorney to meet with the United Financial clients in person. Thus, there is no reliable opportunity for the Panel Attorney to determine the competency of the United Financial clients. [Tr. 683:16-684:6]

k. Due to the FPA's advisory role in assisting the client to fund a trust, the FPA, which has the appearance of being sanctioned by the attorney, is still able to utilize the relationship as an opportunity for the FPA's sales pitch relating to annuities. [Tr. 691:21-25]

l. Although an FPA is now required to make a follow-up appointment after delivering the estate planning documents in order to make his or her sales pitch, the nature of the attorney-client relationship and trust built by the FPA's assistance in executing the estate planning documents would still aide the FPA in making a sale at the follow-up appointment.

m. Finally, both EPAs/HPAs and FPAs still make the determination as to whether a question is legal in nature before deciding whether to answer the question or refer it to an attorney.

133. UFSC's statement concerning changes in the business plan and its present method of operation is found on pages 9 through 19 and is therefore not repeated here.

VII. Facts Pertaining to Ruth Springer (Count I)

134. Ruth Springer ("Ms. Springer") is a seventy-eight (78) year old woman who has never been married and resides in rural Allen County, Indiana. She retired at age 62. [Tr. 63:6-64:8; Ruth Springer Deposition, July 8, 2008, ISBA Exhibit 101,

pp. 9:18-19, 10:5-6, 11:3-6; ISBA Verified Petition ¶ 65; Stipulation of Facts ¶ 116]

135. Over the course of several years, Ms. Springer was given the opportunity to purchase Exxon Mobil stock through her employer. At the time Ms. Springer retired, she owned over 12,000 shares of stock. Ms. Springer testified that in 2002, she had 1,256 shares of stock valued at over $500,000. In February 2002, Ms. Springer's Exxon Mobil stock represented the majority of her net worth. [ISBA Exhibit 101, pp. 16:22-18:16; ISBA Verified Petition ¶ 66; Ruth Springer deposition, ISBA Exhibit 101 pp. 16:22-18:6, 27:17-29:8, 42:19-47:6; Ray Phillips deposition, ISBA Exhibit 107 pp. 126:8-127:10; Stipulation of Facts ¶ 126; Tr. 71:11-23]

136. Ms. Springer returned a direct mail card to UFSC stating that she was interested in a presentation on the probate process [Tr. 82:24 to 83:6, 308:15-23] Waugh received the card. He had known Ms. Springer since 1992 or 1993 when he sold auto insurance to her through a former employer. [Tr. 306:10-307:25]

137. Interested in learning more about the probate process, Ms. Springer met with Waugh, an EPA for United Financial, on or about January 25, 2002, at which time Waugh marketed and sold a revocable trust together with other estate planning documents to Ms. Springer. Waugh advised Ms. Springer about the probate process, explained that she needed these documents in order to avoid

probate, and answered questions regarding estate planning. [Jody Waugh Deposition, June 13, 2008, ISBA Exhibit 102, pp. 61:14-23, 66:16-67:2, 74:8-17; ISBA Exhibit 101, pp. 63:24-64:7; Ruth Springer Affidavit, ISBA Exhibit 103, ¶ 5; ISBA Verified Petition ¶ 67; Tr. 64:16-21; 71:24-72:3]

138. Ms. Springer met with Waugh on the 24th and 25th of January 2002. She was 72 years old at the time. Waugh made a presentation to Ms. Springer and her brother on January 24, 2002 and provided them with information on estate planning and how to avoid probate. Ms. Springer specifically remembers Waugh talking about a living trust and eliminating probate. On January 25, 2002 Ms. Springer purchased United Financial's estate planning assistance services from Waugh, at their second meeting. [Tr. 64:9-65:21; Waugh deposition, ISBA Exhibit 102, pp. 53:13-55:17, 62:25-75:4; Springer deposition, ISBA Exhibit 101, pp. 55:22 to 60:5; Springer Agreement and Receipt, UFSC Exhibit 57; Stipulation of Facts #117]

139. At the meeting, Ms. Springer provided Waugh with her personal and financial information by filling out a Personal and Financial Organizer, and purchased a revocable living trust through United Financial. Ms. Springer paid a fee of $2,495.00 for United Financial's estate planning assistance services. [Ruth Springer Personal and Financial Organizer, ISBA Exhibit 104; Ruth Springer Agreement & Receipt, UFSC Exhibit 57; Eads Deposition, ISBA Exhibit 10, p. 27; Ruth Springer

Affidavit, ISBA Exhibit 103, ¶ 5; Stipulation of Facts ¶ 118]

140. At all relevant times, Waugh was not an attorney and was not admitted to practice law in the State of Indiana. [ISBA Verified Petition ¶ 69] [Darla T. Little Affidavit, ISBA Exhibit 5; Stipulation of Facts ¶ 119] He testified that after dropping out of school he worked in restaurants, worked as a cook and worked as a musician. [Tr. 266:3-9]

141. Prior to joining United Financial, Waugh worked in Dallas, Texas as a sales representative for Advanced Legal Systems ("ALS"), a company that provided estate planning services similar to those of United Financial. ALS ceased operations on or about October 8, 2001. While at ALS, Waugh received four (4) days of training regarding the probate process, including how to avoid probate and how to illustrate the differences between the probate process and other alternatives such as revocable trusts and the like. After joining United Financial, Waugh received only three (3) days of training. [Exhibit 102, pp. 18:9-19:1; 20:18-21:19; 24:24-25:7; ISBA Verified Petition ¶ 70]

142. Waugh is presently the Estate Planning Assistance Area Director for United Financial's Western Florida territory. In that capacity Waugh manages several EPAs. Previously, Waugh was a manager for United Financial for the State of Indiana, and served as the acting manager for the State of Kentucky and Florida. Waugh testified that he has a 7th grade education and no GED. However,

as an EPA, it is his job to educate potential customers on how to protect themselves by the use of trust, in most cases, and how to avoid probate. [ISBA Exhibit 102, pp. 25:22-26:7; Stipulation of Facts ¶ 121; Tr. 265:22-266:2; 276:15-277:16]

143. Prior to January 25, 2002, Ms. Springer had in full force and effect a valid will that accomplished her estate planning needs and desires, which was drafted in 1987 by Hamilton Baldwin for which she paid $20 (the "First Will"). In particular, Ms. Springer's First Will, provided that upon her death each of her six nieces and nephews would receive 200 shares of her Exxon Mobil stock with the remaining shares to be evenly divided between her brother and sister. A true and accurate unsigned copy of the First Will has been marked as Exhibit 105. The original signed First Will had been in her lock box and was destroyed by the bank. Ms. Springer testified that no one at United Financial asked her if she already had a will. [ISBA Exhibit 105; ISBA Exhibit 101, pp. 36:20-25, 38:1-8; ISBA Exhibit 103, ¶ 4; ISBA Verified Petition ¶ 72; Tr. 65:24-66:16; 67:5-68:2; 72:4-7]

144. David Hawk, Ms. Springer's attorney, testified that a comparison of Ms. Springer's First Will and the will from United Financial revealed that both wills have the same dispositive provisions, and thus, the United Financial will was of no value to Ms. Springer. [Tr. 108:18-109:3-6]

145. On or about February 1, 2002, Ms. Springer received a telephone call from Eads, an attorney engaged by United Financial purportedly to draft the estate planning documents sold to her by Waugh. During that conversation, there were no substantive discussions regarding Ms. Springer's estate planning needs, desires, or best interests, nor was Ms. Springer's First Will discussed. Ms. Springer thought that Eads was employed by United Financial. She spoke to Eads only once over the phone and never met him in person. Eads never spoke to Ms. Springer about the attorney-client privilege. [ISBA Exhibit 101, pp. 64:18-66:9, 71:17-21; ISBA Exhibit 103, ¶ 6; ISBA Exhibit 10, p. 64:1-10; ISBA Verified Petition ¶ 73; Tr. 73:11-15; 101:11-17]

146. Eads was admitted to practice law in the State of Indiana on June 9, 2000. Eads began working for United Financial as in independent contractor attorney in early 2000. [ISBA Exhibit 10, pp. 6:21-25, 9:6-12, 10:3-13; ISBA Verified Petition ¶ 74; Andrew Eads Roll of Attorneys Printout, UFSC Exhibit 60; Andrew Eads August 7, 2000 application cover letter, UFSC Exhibit 61; Andrew Eads Independent Contractor Agreement, ISBA Exhibit 9; Stipulation of Facts ¶ 123]

147. On February 12, 2002, Waugh and Raymond C. Phillips ("Phillips"), then a FPA for United Financial, delivered to Ms. Springer an estate planning binder from United Financial which included a Will, Revocable Living Trust, Powers of Attorney, and other related legal documents. A true

and accurate copy of the estate planning documents prepared for Ms. Springer by United Financial has been marked as ISBA Exhibit 106. Ms. Springer testified that Waugh and Phillips were present when she signed the documents. [Tr. 73:23-74:2; Raymond Phillips Deposition, ISBA Exhibit 107, pp. 117:20-25, 118:14-16; ISBA Exhibit 101, pp. 74:1-75:9; ISBA Exhibit 103, ¶ 7; ISBA Verified Petition ¶ 75; Stipulation of Facts ¶ 124]

148. Phillips helped Ms. Springer execute her estate planning documents, answered questions about them, and advised Ms. Springer of the effect of each document and how to fund her trust. [ISBA Exhibit 103, ¶ 7; ISBA Exhibit 107, pp. 120:6-11, 121:9-123:18; Delivery Transmittal and Verification of Duly Executed Documents, ISBA Exhibit 108; ISBA Verified Petition ¶ 76; Stipulation of Facts ¶125; Tr. 101:3-7; 654:21-655:3]

149. While assisting Ms. Springer in executing the documents, Phillips used Ms. Springer's financial information and suggested she purchase deferred annuities. Ms. Springer sold her ExxonMobil stock on February 26, 2002, which was valued at approximately $520,000 in order to buy the annuities. Ms. Springer signed applications for three annuities on February 24, 2002. Phillips received a commission of approximately $40,000.00 on the three annuity sales he made to Ms. Springer. [Ruth Springer Stock Sale Transaction Report, UFSC Exhibit 66; Ruth Springer 2002 annuity applications, UFSC Exhibit 65; Ray

Phillips deposition, ISBA Exhibit 107, pp. 113:10-114:21, 143:14-144:8, 146:15-147:6, 151:4-13; 154:14-158:15, 166:8-17, 196:7-197:15; Ruth Springer affidavit, ISBA Exhibit 103, ¶¶ 8-9; Stipulation of Facts ¶ 127; ISBA Exhibit 101, pp. 85:23-87:6, 87:25-88:5; ISBA Exhibit 108, p. 1082; ISBA Verified Petition ¶ 77; Tr. 74:6-10; 75:10-12; 112:1-18]

150. At the trial, Phillips testified that he specifically remembered Ms. Springer's finances and mental capacity back in 2002. Phillips could not remember how much commission he made from the sale of annuities to Ms. Springer. [Tr. 653:12-22; 655:17-24; 662:23-663:11]

151. Lalama testified that Ms. Springer had been sold a London Pacific annuity, which went into receivership. Lalama then sold Ms. Springer two annuities and put some cash in her hands. Lalama's commission was between $4,000 and $5,000 and United Financial received approximately $10,000. Lalama felt he put Ms. Springer in a better position than before he went to see her. Lalama would not have sold Ms. Springer an annuity over $100,000, which is what Phillips had done. [Tr. 242:2-24; 243:4-21; 244:6-23]

152. As a result of Ms. Springer's sale of her Exxon Mobil stock, she incurred a tax liability of $132,000. Ms. Springer did not talk about tax advice with Waugh and she was not told to seek tax advice. Ms. Springer was only advised by Phillips that it would be more than $100,000. She did not know

anything about capital gain taxes and had never sold stock before. [Tr. 76:7-22; 99:20-100:7-24; ISBA Exhibit 101, pp. 99:19-100:3; ISBA Exhibit 103, ¶ 10; ISBA Verified Petition ¶ 80]

153. On or about March 5, 2002, Ms. Springer executed the "First Amendment to a Trust Agreement of the Ruth I. Springer Revocable Living Trust" (the "Amendment"). This document was personally delivered by Phillips. Phillips assisted Ms. Springer in executing the Amendment and explained its legal effect to Ms. Springer. The document amended the Trust Agreement to reflect that Ms. Springer had sold her stock and provided that upon her death each of her six nieces and nephews would receive $5,000 instead of her Exxon Mobil stock. Eads did not have the Amendment, or notes of any conversations he would have had with Ms. Springer regarding the Amendment, in his files. Ms. Springer testified that she did not talk to Eads about the change to her will. [ISBA Exhibit 103, ¶ 11; ISBA Exhibit 10, pp. 74:13-75:18; ISBA Verified Petition ¶ 81; Tr. 96:1-16]

154. Prior to joining United Financial, Phillips worked at Advanced Legal Systems ("ALS") from 1997 to 2000. Phillips is presently the Vice-President of Financial Planning Assistance Division and oversees the Financial Planning Assistance Division ("FPAD") for United Financial in New Jersey, Pennsylvania, Ohio, Michigan, Kentucky, Indiana, Illinois, Wisconsin, Missouri, Kansas, Oklahoma, Texas, North Carolina, and Florida. Phillips has occupied this position for five (5) years. The FPAD is

comprised of individuals who are familiar with insurance-related services and products. Prior to occupying this position, Phillips was a FPA for three (3) years with United Financial. [ISBA Exhibit 107, pp. 17:22-23, 18:2-19:3, 20:10-13; ISBA Verified Petition ¶¶ 82-83; Stipulation of Facts ¶ 128; Stipulation of Facts ¶ 129]

155. The will and trust sold to Ms. Springer and prepared by United Financial were, according to the testimony of Attorney Hawk, unnecessary and accomplished nothing different than Ms. Springer's preexisting plan of distribution to each of her six nieces and nephews and her brother and sister. [David Hawk Affidavit, ISBA Exhibit 109, ¶¶ 5-7; ISBA Verified Petition ¶ 84; Tr. 108:18-109:6]

156. Respondents Richard Follett, Richard Follett II, Jayne Follett, Beau Follett, James Boyles, Sherry Jordan, Sharon Dorsey, and Gary Lovelady had no direct involvement with Ruth Springer ("Springer"). Tr. at 522:2-16, 533:9-22, 599:7-12; E-mail from Ron Elberger to Kevin McGoff and Rafael Sanchez Re; Job Descriptions, UFSC Exhibit 147.

157. Springer's counsel, David Hawk, acknowledged that the powers of attorney were a "good idea." Tr. 120:11-15.

158. All of Springer's 2002 estate planning documents remain valid and in effect today, though she may have transferred her bank account from the living trust back to herself individually. Tr. 85:20 to 87:5, 110:15 to 111:4.

159. Springer alleged a claim for malpractice against UFSC and Eads in the Allen County Superior Court, which was later dismissed as to UFSC and settled as to Eads. Tr. 121:7 to 122:18.

160. Respondent Ray Phillips does not recall that Springer had any questions relating to the execution of her estate planning documents. Tr. 654:15-17.

161. Phillips discussed with Springer the trust funding process. Tr. 654:21 to 655:5.

162. Phillips does not recall that Springer had any questions relating to funding her trust. Tr. 655:6-8.

VIII. Facts Pertaining to Robert Nesbitt (Count II)

163. Robert K. Nesbitt ("Mr. Nesbitt"), currently 94 years of age, is a widower who resides in an assisted living facility in West Lafayette, Tippecanoe County, Indiana. Mr. Nesbitt's wife passed away in 1996. [Robert Nesbitt Deposition, April 12, 2006, ISBA Exhibit 201, pp. 7:20-23, 10:2-9; Stipulation of Facts ¶ 131]

164. Over the course of many years, Mr. Nesbitt acquired a significant amount of Exxon Mobil and Pfizer stock. At one point, the value of his stock holdings amounted to $470,000. [ISBA Exhibit 201, pp. 12:8-11; 13:2-5; ISBA Verified Petition ¶ 88]

165. Before moving to Indiana, Mr. Nesbitt lived in Ohio and had a will prepared for him in 1996 (the "Ohio Will"). Prior to August 27, 2003, Mr. Nesbitt's Ohio Will accomplished his estate planning needs and desires by leaving his estate equally to his three adult children. [ISBA Exhibit 201, pp. 22:20-23:14; Michael Stapleton Affidavit, ISBA Exhibit 202, ¶ 5; ISBA Verified Petition ¶ 89; Stipulation of Facts ¶ 132; Tr. 345:5-11]

166. Mr. Nesbitt received a solicitation in the mail regarding United Financial's estate planning services. Concerned whether his Ohio will was valid, he returned the reply card to United Financial. [ISBA Verified Petition ¶ 90; ISBA Exhibit 202, ¶ 6; Stipulation of Facts ¶ 133]

167. On or about July 15, 2003, Linda Dishong, now known as Linda Christiano ("Dishong"), an EPA for United Financial, went to Mr. Nesbitt's home for the purpose of marketing and selling a will and a revocable living trust. At the meeting, Dishong discussed estate planning and filled out a Personal and Financial Organizer on behalf of Mr. Nesbitt. Mr. Nesbitt purchased an estate planning package from United Financial. On that date, Mr. Nesbitt paid United Financial the sum of $2,495.00, which represented the cost of United Financial preparing the documents to effectuate the estate plan Dishong sold to him. Dishong left her meeting with Mr. Nesbitt with a check and the completed Personal and Financial Organizer. ISBA Exhibit 203 is the application filled out by Nesbitt. Written on the

application is a note that Nesbitt wants Gail (his daughter) to be at the signing. [Tr. 427:23-428:1; 442:8-12; ISBA Verified Petition ¶91; ISBA Exhibit 201 pp. 16:8-19; EPA Policy and Procedure Guide, UFSC Exhibit 27, pp. 4-6; Robert Nesbitt Personal and Financial Organizer, ISBA Exhibit 203; Robert Nesbitt Agreement and Receipt, UFSC Exhibit 71; Stipulation of Facts ¶ 134]

168. Dishong was assigned to meet with Mr. Nesbitt after he sent a reply card to United Financial. Dishong met with Mr. Nesbitt at his home in an assisted living facility. Dishong used her own sales script (not Waugh's). [Tr. 425:6-16, 23-25]

169. At all relevant times, Dishong was not an attorney and was not admitted to practice law in the State of Indiana. [ISBA Verified Petition ¶ 92; ISBA Exhibit 5; Stipulation of Facts ¶ 135; Tr. 431:21-431:2]

170. Respondent Linda Dishong Christiano ("Christiano") was trained to adhere to the estate planning assistance services sales presentation script when speaking with potential customers. Tr. 433:7-12, 427;7-8.

171. Christiano was aware of and periodically used in her presentations a book entitled "The Living Trust" by Henry Abts, which included information about the probate process. Tr. 426:20 to 427:8, 438-40.

172. Christiano believed that Nesbitt was "sharp as a tack" at the time she arrived to make the presentation. Tr. 425:5 to 426:14, 427:14-22.

173. Mr. Nesbitt had previously and independently decided that he wanted a revocable living trust. Tr. 426:6-14, 427:9-22. After hearing this statement, Christian cur short her presentation to Mr. Nesbitt.

174. On or about July 28, 2003, Mr. Nesbitt received a telephone call from Jackel, an attorney purportedly engaged by United Financial purportedly to draft the estate planning documents sold to him by Dishong. Other than verify names, there were no substantive discussions regarding Mr. Nesbitt's estate planning needs, desires, or best interests. Mr. Nesbitt spoke with Jackel only once on the telephone and never met Jackel in person. [ISBA Verified Petition ¶ 93; Jackel Independent Contractor Agreement, UFSC Exhibit 10, ¶¶ 1-3; Robert Nesbitt Agreement and Receipt, UFSC Exhibit 71; Katie Jackel deposition, ISBA Exhibit 11, pp. 60:21, 63:1-16, 69:14-19, 76:21 to 78:1, 79:25 to 81:6; Stipulation of Facts ¶ 136; Tr. 343:9-17]

175. Katie Jackel drafted Nesbitt's estate planning documents, including a will, revocable living trust, powers of attorney and other related documents.

176. According to the testimony of attorney Michael Stapleton, the estate planning documents sold to Mr. Nesbitt and prepared through United

Financial were unnecessary and accomplished nothing different than Mr. Nesbitt's preexisting estate plan of distribution to his adult children as set forth in the 1996 Ohio Will. [ISBA Exhibit 202, ¶¶ 7-8; ISBA Verified Petition ¶ 102; Stipulation of Facts ¶ 102; Tr. 345:5-11]

177. On or about August 27, 2003, L. Kay Larsen ("Larsen"), an FPA for United Financial, delivered to Mr. Nesbitt an estate planning binder which included the aforementioned estate planning documents, which were not yet executed. [ISBA Verified Petition ¶ 94; Jackel deposition, ISBA Exhibit 11, pp. 63:1-16, 69:18-19, 76:21 to 78:1; ISBA Exhibit 204; Stipulation of Facts ¶ 137]

178. Prior to joining United Financial, Larsen worked for Advanced Legal Systems ("ALS") in Indianapolis, a company that provided estate planning services similar to those of United Financial. While at ALS, Larsen received two (2) weeks of training regarding selling annuities, life insurance and revocable living trusts. After joining United Financial, Larsen received no additional introductory training. [L. Kay Larsen Deposition, February 17, 2006, ISBA Exhibit 205, pp. 8:25-10:2]

179. Larsen helped Mr. Nesbitt execute his estate planning documents advising Mr. Nesbitt of the effect of each document and how to fund his trust. Larsen's primary source of income was from commissions for selling annuities, life insurance and

long-term care insurance. [ISBA Exhibit 205, pp. 23, 24, 32:8-33:8, 43:8-25; Stipulation of Facts ¶ 139]

180. At all relevant times, Larsen was not an attorney and was not admitted to practice law in the State of Indiana. Larsen's business card states that she is an agent for United Financial. [ISBA Verified Petition ¶ 101; Darla T. Little Affidavit, ISBA Exhibit 5; Stipulation of Facts ¶ 143; Tr. 350:4-8]

181. While assisting Mr. Nesbitt in executing the documents, Larsen used Mr. Nesbitt's financial information obtained by Dishong and advised Mr. Nesbitt to liquidate his shares of Exxon Mobil and Pfizer stock which, at the time, were valued in excess of $250,000.00 and comprised nearly the entirety of Mr. Nesbitt's liquid net worth. Larsen suggested Mr. Nesbitt purchase deferred annuities with the proceeds. [Robert Nesbitt Deposition, dated June 22, 2006, ISBA Exhibit 206, pp. 36:9-19, 37:8-20; ISBA Exhibit 205, pp. 32:6-15, 36:11-37:7, 43:11-44:14, 47:6-48:13, 75:5-11; ISBA Exhibit 201, pp. 33:15-34:3; Stipulation of Facts ¶ 140]

182. As an inducement to get Mr. Nesbitt to purchase the annuities, Larsen advised Mr. Nesbitt that she would engage the services of an accountant, Betty Maddux ("Maddux"), to analyze the tax consequences on the sale of his stock. It was represented to Mr. Nesbitt that he would owe the sum of $113.00 as tax on the capital gains. [ISBA Exhibit 205, pp. 53:22-54:19, 61:23-62, 63:24-64:21; ISBA Verified

Petition ¶ 98; Stipulation of Facts ¶ 141; Tr. 344:16-345:4]

183. Relying on this advice, Mr. Nesbitt sold all of his stock in Exxon Mobil and Pfizer and purchased annuities through Larsen, for which she received a commission. Larsen did not disclose to Mr. Nesbitt that she would make a commission off of the sale of the annuities. [Nesbitt Stock Sale report, UFSC Exhibit 77; Maddux Tax Calculation Fax, UFSC Exhibit 78; ISBA Exhibit 201, pp. 35:9-38:12; ISBA Exhibit 205, pp. 48:22-50:23; ISBA Verified Petition ¶ 99; Stipulation of Facts ¶140]

184. Contrary to what Mr. Nesbitt had been told, his tax liability for the sale of the Pfizer and Exxon Mobil stock was $37,321.00. [ISBA Exhibit 205, pp. 65:10-66:20; ISBA Verified Petition ¶ 100; Tr. 336:24-337:22, 345:2-4]

185. UFSC did not authorize and was not aware that Respondent L. Kay Larsen referred Nesbitt to Betty Maddux for tax advice. Tr. 537:18 to 438:10. Although their advertizing clearly indicated their "team" included a tax specialist, there was no one within the UFSC "team" to help answer Mr. Nesbitt's very specific question about his tax liability.

186. Mr. Nesbitt's family sought tax advice and legal help from Richard Bartholomew, a CPA and Attorney who does estate planning and tax work. Mr. Bartholomew was "outraged" by Mr. Nesbitt's situation. Prior to his dealings with United Financial, Mr. Nesbitt had possessed $250,000 to $280,000

worth of stock; however, after the transactions with United Financial, Mr. Nesbitt had insufficient cash flow to take care of his daily living expenses. Mr. Bartholomew was trying to rescind the transaction to solve Mr. Nesbitt's liquidity and cash flow problems. Mr. Bartholomew thought Nesbitt might have a claim resulting from Nesbitt's dealings with United Financial and referred the case to Michael Stapleton. [Tr. 336:12-19; 337:6-338:1]

187. Mr. Stapleton is an attorney who has practiced in Indiana since 1972. He represented Mr. Nesbitt in a legal action against United Financial, Katie Jackel, Larsen, and Maddux. [Tr. 336:5-7; 341:10-14]

188. When Stapleton met Nesbitt in 2005, he was 90 years of age and legally blind due to macular degeneration. Mr. Nesbitt had hearing aids, but did not like to wear them. Mr. Stapleton testified that, in order to have a meaningful conversation with Mr. Nesbitt, Mr. Nesbitt's daughter had to be present and that Mr. Nesbitt required an assisted living arrangement. Further, although Mr. Nesbitt could recall things that happened 30 years ago, his short-term memory was not good. Mr. Stapleton would not have attempted to determine competency over the telephone, as former attorney Jackel had done before drafting Mr. Nesbitt's estate planning documents. Rather, if he had asked Mr. Nesbitt to sign a will or trust, Mr. Stapleton would have asked Mr. Nesbitt's family or medical professionals about Mr. Nesbitt's competency. Stapleton further testified that Mr.

Nesbitt was easily influenced and responded to persons exercising authority, which concerned Mr. Stapleton. [Tr. 338:9-339:1; 339:2-13; 339:14-20; 341:6-9]

189. Mr. Nesbitt's Complaint, as drafted by Mr. Stapleton, generally alleged that upon moving to Indiana Mr. Nesbitt did not need a new estate plan to effectuate his intent of dividing his estate equally among his three daughters. [Tr. 340:7-25]

190. The estate plan and annuities sold to Mr. Nesbitt resulted in significant tax liability and left Mr. Nesbitt with insufficient funds to pay his day-to-day expenses. The goal of the litigation was to reverse the entire effect of the transactions between United Financial and Mr. Nesbitt. [Tr. 344:16-345:4; 337:6-22; 341:17-20]

191. Mr. Stapleton talked with United Financial about rescinding the annuities sold to Mr. Nesbitt, but the company was not cooperative. [Tr. 341:17-24]

192. As a result of Mr. Nesbitt's lawsuit, the parties settled. United Financial rescinded the annuities and a made a payment to Mr. Nesbitt of $45,000.00, which compensated him for his tax liability and a portion of his legal fees. [UFSC Exhibit 79; Tr. 346:2-10]

193. Respondents Richard Follett, Richard Follett II, Jayne Follett, Beau Follett, James Boyles, Sherry Jordan, Sharon Dorsey, and Gary Lovelady

had no direct involvement with Robert Nesbitt ("Nesbitt"). Tr. at 522:2-16, 533:9-22, 599:13-16; E-mail from Ron Elberger to Kevin McGoff and Rafael Sanchez Re; Job Descriptions, UFSC Exhibit 147.

194. Nesbitt eventually settled all of his claims against UFSC. Robert Nesbitt Settlement Agreement, UFSC Exhibit 79.

IX. Facts Pertaining to Vesser John and Helen M. Davis (Count III)

195. At all relevant times herein, Vesser John Davis ("Mr. Davis") and Helen M. Davis ("Ms. Davis") (collectively the "Davises") were an elderly couple who resided at [Home Address Omitted]. The Davises' business was general farming and they owned approximately 200 acres. Mr. Davis passed away in January, 2008. The Davises have 6 children. [Tr. 356:7-25; 370:8-18; Helen Davis Affidavit, ISBA Exhibit 301, ¶ 1; ISBA Verified Petition ¶ 104]

196. In 1997, Vesser John Davis was 72 years old and Helen M Davis was 69 years old. Mr. and Mrs. Davis were first introduced to United Financial in early 1997 through an acquaintance, Roy Langdon ("Langdon"), when he stopped by their house and brought up the subject of having a trust and a partnership for their farm. The Davises thought what Langdon was telling them sounded like a good idea, and shortly thereafter, the Davises started meeting with James Boyles ("Boyles") from United Financial.

[ISBA Exhibit 301, ¶ 2; ISBA Verified Petition ¶105; Stipulation of Facts ¶ 145; Tr. 357:16-23]

197. On two separate occasions, and at the request of the Davises, two of their children, Charles Davis ("Charles") and Nancy Davis ("Nancy") (the Davises and their children are hereinafter collectively referred to as the "Davis Family"), accompanied the Davises to United Financial's office then located at 79th and Georgetown in Indianapolis for meetings in or around January of 1997. [Nancy Davis Affidavit, ISBA Exhibit 302, ¶ 3; ISBA Verified Petition ¶ 106; Stipulation of Facts ¶ 147]

198. At the meetings at United Financial's office, the Davis Family met with Boyles, a United Financial employee. During one of the meetings, Boyles drew on a flipchart and illustrated the ways a partnership and corporation could be set up, explained the advantages and disadvantages of wills versus trusts, and explained the probate process. Boyles also explained to the Davis Family how to arrange their finances and advised them on how to do the corporate structure of the family farm business. Boyles also talked about how to avoid probate, avoid inheritance taxes and recommended how it should be done. The purpose of the meeting was to set up the corporate entities and avoid taxes. Present at the meeting were Nancy, Charles, John and Helen Davis and Boyles. Nancy testified that she was absolutely certain no one else entered the room. The Davises did not meet with Steve Heining. [Tr. 359:12-17; 365:2-20;

372:14-25; 373:1-17; 387:13-18; 388:5-12; ISBA Exhibit 301, ¶ 4; ISBA Exhibit 302, ¶ 4; ISBA Verified Petition ¶ 107; Stipulation of Facts ¶148]

199. The presentation and diagrams made by Boyles at the first meeting was particular to the Davises' family's business. Boyles recommended they set up the family limited partnership for the farm along with a corporation and the trusts. Boyles' diagrams indicated what to put in each entity and how to funnel funds to the right place to avoid probate and inheritance taxes. [Tr. 373:18-375:1; 375:17-376:5]

200. Nancy testified that only Boyles was present at the second meeting she attended at United Financial. Nancy believes that Boyles may have used more diagrams and flipcharts to clarify what he presented at the first meeting. [Tr. 377:14-25]

201. The Davis Family thought Boyles was an attorney. Helen and Nancy Davis testified that Boyles did not say he was an attorney but they assumed he was an attorney from him telling them how to structure everything, avoid probate and set up appropriate entities. [Tr. 361:23-263:5; 376:23-377:10; ISBA Exhibit 301, ¶ 3; ISBA Exhibit 302, ¶ 5; ISBA Verified Petition ¶ 108]

202. The Davis Family relied on Boyles' presentations and advice when they decided to set up the corporate structure. [Tr. 378:21-379:1]

203. On or around January 24, 1997, the Davises purchased an estate planning package from United Financial. That same day, the Davises paid United Financial the sum of $1,650.00, which represented the cost of United Financial preparing the documents to effectuate the estate plan Boyles sold to the Davises. [ISBA Exhibit 301, ¶ 4; Proof of payment, ISBA Exhibit 303; ISBA Verified Petition ¶ 109; Davis Personal and Financial Organizer, UFSC Exhibit 82; Davis Agreement and Receipt, UFSC Exhibit 81; Stipulation of Facts ¶ 149; Tr. 360:8-22]

204. Prior to January 24, 1997, the John and Helen Davis had wills prepared in 1993 by an attorney from Noblesville. [ISBA Exhibit 301, ¶ 5; ISBA Verified Petition ¶ 110; Tr. 357:3-15; ISBA Exhibit 308] The Davises did not inform any UFSC employee, representative or panel attorney that they had wills drafted by an attorney in Noblesville, Indiana.

205. Heining drafted a revocable living trust, wills, powers of attorney and other related estate planning documents for Vesser John Davis and Helen Davis. Tr. at 706:18-25; Davis Estate Planning Documents, Petitioner Exhibit 304; Steve Heining cover letter, UFSC Exhibit 83.

206. On March 3, 1997, Boyles delivered to the Davises their estate planning documents, which consisted of wills, a revocable living trust, powers of attorney, and other related legal documents for John and Helen Davis. A true and accurate copy of the estate planning documents prepared for the Davises

by United Financial has been marked as ISBA Exhibit 304. [ISBA Exhibit 301, ¶ 6; ISBA Verified Petition ¶ 111; Stipulation of Facts ¶ 150]

207. Although the Davises' estate planning documents bear the name of Steve A. Heining as the attorney who allegedly prepared the documents, the Davises never met with or talked to Mr. Heining. Although Rich Follett testified at trial that, even though he never met or spoke with Ms. Davis, he remembered seeing her meet with Steve Heining twelve (12) years ago at United Financial's office. The Commissioner finds this testimony not to be credible. [ISBA Exhibit 301, ¶ 7; ISBA Verified Petition ¶ 112; Tr. 362:9-14; 367:6-10; 625:19-627:21]

208. Nancy testified that they never met with Steve Heining nor talked to Steve Heining. They first learned of the name of Steve Heining when they got the documents. [Tr. [Tr. 378:1-6, 17-20]

209. Boyles and Langdon helped the Davises execute their estate planning documents and advised the Davises of the legal effect of each document and how to fund their trust. Boyles also recommended that the Davises purchase annuities, but they declined due to lack of cash. [Exhibit 301, ¶ 6; ISBA Verified Petition ¶ 113; Stipulation of Facts ¶ 151]

210. On or around March 13, 1997, the Davises paid United Financial the sum of $3,500.00 to create a limited family partnership and corporation for their family farm business, as previously recommended by Boyles. [ISBA Exhibit 301, ¶ 8; Proof of payment,

ISBA Exhibit 305; ISBA Verified Petition ¶ 114; Tr. 361:1-14]

211. At the suggestion of United Financial, the Davises updated their Wills on or about November 7, 2000 through United Financial. The attorney's name that appears on these documents is John M. Joyce. The Davises briefly met, but never had substantive discussions with, Mr. Joyce. The updated Wills were witnessed by Leigha Arvin and Angela Garnett. Ms. Davis believes the witnesses were employees of United Financial. [ISBA Exhibit 301, ¶ 9; ISBA Verified Petition ¶ 115; Stipulation of Facts ¶ 152]

212. At all relevant times, Boyles was not an attorney and was not admitted to practice law in the State of Indiana. [ISBA Verified Petition ¶ 116; ISBA Exhibit 5]

213. Subsequent to the delivery of the estate planning and corporate documents, the Davises tried to reach United Financial for assistance with the gifting to their children but were having difficulties reaching Boyles. The Davises went to United Financial's office, sat in the lobby for some time, and were eventually told Boyles was unavailable. The receptionist at United Financial also told the Davises that they had lost their estate planning documents binder. Several days later, a United Financial representative called the Davises' home and said he had the binder, after which he was instructed to drop it off at the Davises' home. [Tr. 379:10-14; 380:3-14; 381:2-12; 392:2-9]

214. Nancy Davis testified that the Davises engaged another attorney, Carol Adinamas, to look at everything that United Financial had done. [Tr. 382:24-25; 383:1-8]

215. Carol Adinamas, who is a CPA and has been an estate planning attorney for almost seventeen (17) years, appeared at trial and testified that the estate planning documents prepared through United Financial were inadequate and contained provisions that are invalid in Indiana. In addition, the corporate documents sold to the Davises and prepared by United Financial in 1997 were deficient and ultimately resulted in gain being subject to double taxation due to the corporate structure, which United Financial recommended and then established for them. Carol Adinamas identified several other issues that arise out of the documents prepared by United Financial. These issues are identified and set forth in a memorandum Carol Adinamas, prepared for the Davises' file, which has been marked as Exhibit 307 and incorporated herein by reference. [Carol Adinamas Affidavit, ISBA Exhibit 306, ¶¶ 5-6; ISBA Verified Petition ¶ 117; Tr. 389:17-24]

216. At trial, Carol Adinamas made the following observations about the estate planning and corporate documents prepared through United Financial:

a. The estate planning documents appeared to be fill-in-the-blank forms, drafted for community property states, not Indiana. [Tr. 391:5-13]

b. There were three trusts (A, B, C), which is uncommon and unnecessary. [Tr. 391:14-16; 392:21-25]

c. The trusts had a provision that is clearly invalid under Indiana law. [Tr. 391:14-21]

d. The trust should not have been a joint trust because of the issues related to step up in basis. [Tr. 393:2-7]

e. There were issues with the ancillary documents and there should have been some additional things in the Power of Attorney. [Tr. 393:12-16; 390:21-391:2; ISBA Exhibit 304]

f. The corporate structure was deficient and unsuitable for the Davises because it trapped highly appreciated property/gain in a C Corporation, which creates a significant tax issue on any capital gains. [Tr. 393:18-395:16]

g. In sum, Carol Adinamas believes that the documents were deficient and not appropriate for the Davises. [Tr. 392:21-23; 393:7-10; 396:13-15]

199. Carol Adinamas did what she could to rectify the problems caused by United Financial's work. She eliminated the family limited partnership and changed the C Corporation to an S Corporation. However, in order to avoid the higher corporate gain tax, the Davises must wait ten (10) years from the date the S election was filed, which was January 1, 2005, before they can sell their property. [Tr. 394:22-395:20; 403:19-20]

200. The Davises at one point in time were offered $4,000,000.00 for the 80 acres of property that were placed into the C Corporation established by United Financial, but they were unable to accept the offer due to the double taxation that would be incurred as a result from the sale. The difference in tax between the C Corporation and the S Corporation under this offer would have been $640,000.00. [Tr. 404:24-405:14; ISBA Exhibit 302, ¶ 6; ISBA Verified Petition ¶ 118]

201. It cost the Davises the sum of $8,336.50 in attorneys' fees and expenses to redo the estate planning and corporate documents prepared through United Financial. [ISBA Exhibit 306, ¶ 7; ISBA Verified Petition ¶ 119; Tr. 394:17-23]

202. Respondents Richard Follett, Richard Follett II, Jayne Follett, Beau Follett, Sherry Jordan, Sharon Dorsey, Ray Phillips, and Gary Lovelady had no direct involvement with Vesser John or Helen M. Davis. Tr. at 522;2-16, 533:9-22, 599:17-20; E-mail from Ron Elberger to Kevin McGoff and Rafael Sanchez Re; Job Descriptions, UFSC Exhibit 147.

X. Facts Pertaining to Mary E. Reynolds (Count IV)

203. Mary E. Reynolds ("Mrs. Reynolds") was 61 and her husband Forrest Darrell Reynolds was 65 in June of 1998. In 1998, Mr. and Mrs. Reynolds owned about 600 acres of farmland. Mr. Reynolds passed away in January of 2005. Mrs. Reynolds still

lives in Westfield, Indiana and is the neighbor of Helen M. Davis. [Mary E. Reynolds Affidavit, ISBA Exhibit 401, ¶ 2; Stipulation of Facts ¶ 154]

204. Mr. and Mrs. Reynolds were first formally introduced to United Financial through witnessing the execution of Vesser John and Helen Davis' estate plan on March 3, 1997. [ISBA Exhibit 401, ¶ 3; ISBA Exhibit 304; Stipulation of Facts ¶ 155]

205. Boyles and Langdon visited Mr. and Mrs. Reynolds' home in July 1998. Langdon was a local insurance agent who was well-connected with the local farming community due to his previous work at the grain elevator. Langdon occasionally worked with United Financial when selling insurance products. [ISBA Exhibit 401, ¶ 4; Stipulation of Facts ¶ 156; Tr. 701:10-702:2]

206. During the visit from Boyles and Langdon, Mr. and Mrs. Reynolds purchased an estate planning package from United Financial. That same day, Mr. and Mrs. Reynolds paid United Financial approximately $1,750 for the estate plan Boyles sold them. Later, Mr. and Mrs. Reynolds also paid United Financial approximately $3,500 to establish a corporation. [ISBA Exhibit 401; ¶ 5; ISBA Verified Petition ¶ 124]

207. At all material times, Boyles was not an attorney and was not admitted to practice law in the State of Indiana. [ISBA Verified Petition ¶ 125; ISBA Exhibit 5]

208. On July 30, 1998, Langdon and Boyles went to Mr. and Mrs. Reynolds' home to assist them with the execution of their estate planning documents, which included a will, revocable living trust, powers of attorney, and other related legal documents (the "1998 Estate Plan") and advised them of the legal effect of each document and how to fund their trust. Boyles also recommended that Mr. and Mrs. Reynolds purchase annuities, but the Reynoldses declined. [ISBA Exhibit 402; ISBA Exhibit 401, ¶ 6, 8; Stipulation of Facts ¶ 157; Verified Petition ¶ 128]

209. Although the Reynolds' estate planning documents bear the names of Andrew M. Eads and Nancy Lanier as the attorneys who allegedly prepared the documents, the Reynolds never met with or spoke to Mr. Eads. [ISBA Exhibit 401, ¶ 7; ISBA Verified Petition 127] It appears that Nancy Lanier drafted the estate planning documents for Forrest Darrell Reynolds and Mary E. Reynolds consisting of wills, a revocable living trust, powers of attorney and other related documents. Tr. at 714:9-25; Nancy Lanier July 24, 1998 letter, UFSC Exhibit 90; Reynolds Estate Planning Documents, Petition Exhibit 402; Reynolds Verification of Executed Documents, UFSC Exhibit 92.

210. In early 2005, *after* the death of Mr. Reynolds, 2005, Mrs. Reynolds was contacted by someone at United Financial, and on March 8, 2005 Mrs. Reynolds paid $500.00 to United Financial on March 8, 2005 to facilitate the drafting of a Credit Shelter Trust (the "Post-Death Trust"). [Reynolds

Credit Shelter Trust, UFSC Exhibit 93; Reynolds Credit Shelter Trust certification, UFSC Exhibit 94; ISBA Exhibit 401, ¶ 9; Stipulation of Facts ¶ 158] Attorney Andrew Eads drafted the Credit Shelter Trust Agreement purchased by Mary Reynolds.

211. Jack Hittle represents Mary Reynolds in the administration of Mr. Reynolds' trust and estate. [Tr. 220:5-221:9]

212. Mr. Hittle has been an attorney for 36 years with a general practice in Noblesville, Indiana, which includes estate planning work. [Tr. 219:19-220:1]

213. In the course of his representation of Mrs. Reynolds, Mr. Hittle examined the 1998 Estate Plan and the Post-Death Trust, purchased by Mrs. Reynolds on March 8, 2005, that the Reynoldses had received from United Financial. [Tr. 221:10-18]

214. Mr. Hittle testified that although most attorneys avoid the use of a joint trust, the 1998 Estate Plan was a fairly typical form, and it was not deficient. However, the Post-Death Trust was "completely meaningless" and unnecessary and he could not understand why it had been drafted. The 1998 Estate Plan was acceptable and fulfilled the Reynolds's estate planning desires, whereas the Post-Death Trust was unnecessary and defective. [Tr. 222:4-12; 19-22-223:6] Specifically, Mr. Hittle compared the Post-Death Trust with the provisions of the

B-Trust included in the 1998 Estate Plan and testified as to the following deficiencies in the Post-Death Trust:

a. The Post-Death Trust purported to name Mrs. Reynolds' son Robin as a co-trustee, but there was not authority for Robin to be named a co-trustee; [Tr. 223:9-12]

b. At the time the Post-Death Trust was drafted and executed, Mrs. Reynolds had no right to modify the irrevocable credit shelter trust, which vested and became irrevocable upon Mr. Reynolds' death; [Tr. 223:11-17]

c. The lack of authority to appoint Robin as a co-trustee and to modify the irrevocable credit shelter trust created a potential problem for the transfer of securities. Additionally, it was vulnerable to challenge by future beneficiaries; [Tr. 223:19-224:3]

d. The Post-Death Trust purports to create a trust. However a credit-shelter trust cannot be created after the death of the grantor; [Tr. 224:4-8]

e. The Post-Death Trust purports to allow additional property to be used to fund the trust after Darrell's death. This provision is not proper under the Internal Revenue Code and would be likely to lead to illegal action if a lay person trustee like Mrs. Reynolds followed this provision; [Tr. 224:9-23]

f. Although the B trust did not contain a power of appointment clause, the Post-Death Trust did; [Tr. 224:24-225:4]

g. There were arbitrary changes from the B Trust to the Post-Death Trust; [Tr. 225:5-8].

h. Finally, the Post-Death Trust contained a form to allow gifts to be made to the trust, which is clearly improper. [Tr. 225:9-16]

215. In addition to these deficiencies, Mr. Hittle noted that one deed which Ms. Lanier had recorded for the Reynoldses contained an improper legal description. Mr. Hittle attempted to contact Nancy Lanier in order to obtain a scrivener's affidavit to correct this recording error. Mr. Hittle testified that he was unable to locate Ms. Lanier and could not find her on the Indiana Roll of Attorneys. [Tr. 226:3-4; 11-18]

216. In addition to the estate planning documents purchased by the Reynoldses from United Financial, Mr. Hittle reviewed corporate documents prepared for the Reynoldses by United Financial. Mr. Hittle testified that the corporation established by these documents "should have been set up as a Sub S corporation for income purposes, rather than a C corporation, to avoid the double-taxation problem." [ISBA Verified Petition ¶124; ISBA Exhibit 401, ¶5; Tr. 226:24-227:14]

217. Respondents Richard Follett, Richard Follett II, Jayne Follett, Beau Follett, Sherry Jordan, Sharon Dorsey, Ray Phillips, and Gary Lovelady had

no direct involvement with Mary E. Reynolds ("Reynolds"). Tr. at 522:2-16, 533:9-22, 599;21-24; E-mail from Ron Elberger to Kevin McGoff and Rafael Sanchez Re; Job Descriptions, UFSC Exhibit 147.

218. At no time did Forrest Darrell Reynolds or Mary E. Reynolds ever request a refund for any of the services performed for them by Lanier or Eads. Tr. 538:18 to 539:2.

XI. Facts Pertaining to Leanna Thompson

219. Leanna Thompson ("Ms. Thompson") is a retired woman who has lived in Clay City, Indiana for 61 years. She worked for First Finance Bank for 38 years in Savings Bonds. [Tr. 152:4-24]

220. Ms. Thompson first became acquainted with United Financial when someone stopped by her home in 2007. She told that person that she might be interested later. Then last summer, around July 2008, she met with Gary Lovelady ("Lovelady"), who gave her a packet of information regarding estate planning. [Tr. 153:18-154:2; 154:6-13]

221. Lovelady advised Ms. Thompson to place her assets into a revocable living trust. [Tr. 154:16-22]

222. Ms. Thompson paid United Financial the sum of $2,495 on July 10 or July 16, 2008 for a revocable living trust package. Even though Lovelady took her $2,495 in July of 2008, Ms. Thompson did not get her estate planning documents until November 2008. [Tr. 155:17-22; 156:1-5; 187:18-23]

223. Jeff Sucic ("Sucic"), an FPA with United Financial, delivered Ms. Thompson's estate planning documents on November 10, 2008. Prior to delivering her estate planning documents, Sucic had access to Ms. Thompson's financial information from the EPA/HPA that had originally signed up Ms. Thompson. Ms. Thompson did not know Lovelady was providing her annuity information to others. [Tr. 128:14-129:2; 134:14-18; 159:23-160:19]

224. Sucic did not meet or speak with Panel Attorney John Joyce, or any other attorney, prior to delivering the estate planning documents to Ms. Thompson. [Tr. 136:11-18]

225. Sucic has been an FPA for United Financial for 5 years, residing in Indianapolis. His supervisor is Dale Anderson. Sucic was trained by United Financial personnel. He attended a one-week training seminar. [Tr. 128:3-10; 141:2-4; 141:21-142:2]

226. It took Sucic 1 hour and 10 or 20 minutes to get to Ms. Thompson's home. He was only paid $50 fee to deliver the documents. [Tr. 128:5-18]

227. Sucic explained the documents to Ms. Thompson, witnessed her signature, and notarized the documents. Even though the estate planning documents indicated they were drafted by John Joyce, Ms. Thompson never met him in person. She only talked to him on the phone twice. Ms. Thompson did not call John Joyce during her meeting with Sucic. At this meeting, Sucic learned that Ms. Thompson

already had annuities. [Tr. 129:19-130:7; 132:9-12; 132:23-133:1; 134:23-135:1; 156:19-22; 159:2-22]

228. Thompson had no questions about the documents at the time of execution. Tr. at 132:9-12, 156:23-24.

229. At the time she paid United Financial for the estate planning services, Ms. Thompson had not been provided the name or identity of the lawyer who was going to prepare her documents. Ms. Thompson eventually understood that John Joyce was the attorney that United Financial appointed. [Tr. 189:5-23]

230. At Sucic's request, Ms. Thompson showed Sucic her documents related to her existing annuities when she executed the estate planning documents. Armed with this information, Sucic set up a subsequent appointment with Ms. Thompson for the following week for the purpose of trying to sell her annuities. [Tr. 134:7-13; 157:5-18]

231. During the subsequent appointment, Sucic made an annuity presentation and successfully solicited Ms. Thompson to transfer her existing annuities to some new annuities through him. Sucic told Ms. Thompson she would get $20,000 or $30,000 cash back from the transaction. Ms. Thompson received $20,000, but taxes were not withheld. As a result, Ms. Thompson owed $6,000 in taxes. Prior to this time, Ms. Thompson was living on $20,000 per year. She had $33,000 in the bank as an emergency fund. [Tr. 135:2-8; 162:16-163:10; 163:15-24]

232. Sucic does not know if anyone at United Financial discussed the tax implications of transferring the annuity policies with Ms. Thompson. However, Sucic acknowledged at trial that Ms. Thompson's penalty for transferring her existing annuities was approximately $26,000. [Tr. 135:12-18; 136:3-10]

233. Sucic knew Ms. Thompson had a financial advisor but did not know that person's name. He does not recall telling Ms. Thompson not to contact that person. Sucic believes he would have told Ms. Thompson that her financial advisor would gain financially and try to talk her out of effecting the transfer. [Tr. 136:20-25; 137:3-5; 137:15-21]

234. At trial, Sucic testified that he did not know the exact surrender period on the annuities he sold to Ms. Thompson, though he believes that it was 12 or 14 years in order to transfer without penalty. The amount of bonus that Ms. Thompson received from the transfer of the annuities was not enough to cover the surrender charges from her prior annuities. [Tr. 138:6-20; 145:25-146:2; 146:11-13]

235. The parties stipulated that the sales commission on annuities sold to Ms. Thompson by United Financial were as follows: Sucic received $10,000 and United Financial received $25,000. [Tr. 146:15-147:5]

236. Ms. Thompson's attorney is Jeff Woodruff, who has been practicing law for 22 years. He had written a will along with an irrevocable living trust

for Ms. Thomson sometime in 1999 or 2000, prior to her involvement with United Financial. Joyce was informed of this trust. At trial, Woodruff described Ms. Thompson as "an incredibly trusting individual," whose total assets in 1993 were around $250,000. [Tr. 153:4-5; 8-17; 191:5-15; 191:23-192:6; 192:9-17; 198:6-10]

237. Ms. Thompson did not need the estate plan prepared through United Financial, according to the testimony of Woodruff, because the bulk of her assets were still in the irrevocable trust set up by Woodruff in 1993. Woodruff testified that United Financial's estate planning documents appear to be cookie-cutter fill-in-the blank documents. The will has provisions for minors and children under the age of 21, which are not pertinent to Ms. Thompson's situation. There were no powers of attorney in place and the health-care power of attorney was incomplete. [Tr. 195:2-7; 196:2-21]

238. For the past five (5) years, Cindy Cox ("Cox") has been Ms. Thompson's financial consultant and has handled all of her financial matters. Cox has been an investment broker for sixteen (16) years in Sullivan, Indiana. [Tr. 199:12-17; 200:14-15]

239. Prior to being approached by United Financial, Ms. Thompson had purchased some variable annuities with MetLife in 2003 through Cox. Given the fluctuations of the stock market, Cox made sure that Ms. Thompson's investments were protected by moving her into a fixed annuity that offered an

income rider, which increased Ms. Thompson's income value at a fixed 6% a year. [Tr. 200:16-202:6]

240. Sucic advised Ms. Thompson that if Cox called her, she should not listen because Cox was only interested in making money. Upon receiving a notification regarding a zero balance in Ms. Thompson's account with MetLife, Cox called Ms. Thompson and talked with her to make sure she understood how much the surrender charges would be. However, following Sucic's instructions, Ms. Thompson did not listen to Cox's advice. Ms. Thompson incurred surrender charges in the amount of $28,842.77. [Tr. 163:25-164:9; 202:16-22; 202:23-203:17; 212:21-213:2]

241. The annuities sold by Sucic had a lower service charge but not the same benefits. United Financial's account was an index annuity based on S&P 500 index and, unlike the annuity Ms. Thompson previously acquired through Cox, there is no income rider on it. [Tr. 202:7-15; 211:12-212:9]

242. By the time Ms. Thompson realized the amount of money she would lose and reached out to Cox for help, the free look period of 10 days had expired for the annuity sold by Sucic and Cox was unable to do anything for her. Cox testified that she believed that Sucic and United Financial could have assisted Ms. Thompson when she changed her mind. [Tr. 204:11-206:23]

243. Contrary to what Sucic suggested to Ms. Thompson, Cox's commission on the prior sale of her annuities to Ms. Thompson was not affected by the

surrender of the annuities. Cox received her full commission in 2006. Thus, no matter what Ms. Thompson did with her annuities, Cox would not have received any additional commission. [Tr. 207:14-24]

244. Cox assisted Ms. Thompson in drafting letters and submitting a complaint to the Department of Insurance and to Old Mutual. Cox felt strongly about what had happened to Ms. Thompson and decided she needed to do something about it. [Tr. 208:8-12; 214:16-25; 215:5-11; 218:13-24]

245. As part of her application for estate planning assistance services, Thompson signed and initialed an Agreement and Receipt form which provided, in part, the following: "UFSC represents, and the Client acknowledges, that UFSC (a) is not a lawyer or a law firm, (b) does not engage in the practice of law, (c) will not provide legal advice to the Client in any respect regarding the Legal Documents and (d) will not interfere in any respect with the Attorney-Client relationship between the Client and the Attorney of the Attorney-Client privilege." Leanna R. Thompson Agreement and Receipt, UFSC Exhibit 132, Paragraph 9; Tr. at 166:14-17, 167:7-168:3,171:15 to 172:8.

246. As part of her application for estate planning assistance services, Thompson signed and initialed an Agreement and Receipt form which provided, in part, the following: "The UFSC representative who signs this Agreement and Receipt is not an attorney and should not be relied upon to provide any

legal advice to the Client." Leanna R. Thompson Agreement and Receipt, UFSC Exhibit 132, Paragraph 10; Tr. at 166:14-17, 167:7-168:3,171:15 to 172:8.

247. As part of her application for estate planning assistance services, Thompson signed and initialed a Letter of Understanding form which provided, in part, the following: "Client should discuss all estate planning options with an attorney prior to determining which plan best suits Client based on his or her individual circumstances. UFSC is not advising Client that any particular Legal Documents is appropriate for their situation." Leanna R. Thompson Letter of Understanding, UFSC Exhibit 134, Paragraph 4; Tr. at 169:2-25.

248. As part of her application for estate planning assistance services, Thompson signed and initialed a Letter of Understanding form which provided, in part, the following: "As a comprehensive financial and estate planning firm, UFSC represents certain insurance companies that sell regulated investment and insurance products. After review of the financial information provided by Client, we may recommend certain insurance, annuity or other financial products that could be beneficial to Client. These products generate a commission to both UFSC and to its financial sales representative. Client is under no obligation to purchase these products. Neither the attorney who represents Client in the preparation of his or her estate plan, nor the representative witnessing the Client's signature will receive any

compensation from the sale of such products." Leanna R. Thompson Letter of Understanding, UFSC Exhibit 134, Paragraph 7; Tr. at 169:2-25.

XII. Costs and Expenses

A. Reimbursement/Disgorgement of Funds

249. Since disgorgement is a remedy the Court may impose, the record includes financial information for the Court's edification. Other than specifically requesting that the victims named in the petition be reimbursed, the ISBA did not request disgorgement of funds.

250. United Financial objected to sharing financial information about the company in two separate instances. The company took the position that it should not have to divulge the amount of income it received for selling estate plans in Indiana beyond two (2) years from the date of the ISBA's petition because there is a two year statute of limitations. Additionally, United Financial would not provide documents to demonstrate how much the company earns overall in the state of Indiana. These issues were resolved and the information is of record, or the company under an order to preserve it for the Court.

251. The company's records reflecting the estate plans sold, money earned from those sales and refunds made, in whole or in part are ISBA Exhibits 24-28. There are various versions of these documents

and United Financial represented that Exhibits 24 and 25 are accurate.

252. A summary of these two documents is ISBA Exhibit 36. In Indiana alone, United Financial was paid $2,747,395 for the sale of 1306 estate plans in this 31 month period. Only nine (9), representing. 006% of the sales made were later downgraded, meaning a plan less than the most expensive plan was later selected. One Hundred Thirty-Six (136) of these plans were cancelled and the money refunded, which is slightly more than ten (10) percent of the plans sold.

253. The parties agreed, and the Commissioner ordered, that United Financial preserve the records identifying clients who purchased estate plans from the company, and what they paid, from the inception of this program in 1995 through September 2006, in the event the Court should want access to that information.

254. United Financial resisted providing documents to demonstrate what the company makes from the enterprise in the state of Indiana. After the company's president professed not to know some of the specifics about the company's income, the Commissioner ordered the principals to produce financial records during the hearing. A profit and loss statement reflecting the company's position from October 2006 to May 2009 for all of its business throughout the country was produced. Upon doing so, the company desired to protect United Financial's record

from competitors, some of whom were monitoring the hearing.

255. The parties entered into a stipulation in lieu of the company's P & L being made a part of the record. The stipulation found a page 576 of the transcript, in conjunction with the financial information found in Exhibits 24 and 25, reflect that United Financial brought in more than $29,000,000 in revenue from all sources from October 2006 through May 2009.

256. Ruth Springer incurred expenses incidental to her purchase of an estate plan from United Financial in the total amount of $2495 for the estate plan marketed and sold to her by United Financial. She incurred $132,000 for the taxes she paid upon liquidating her stock and using the proceeds to purchase annuities sold by United Financial.

257. Robert Nesbitt incurred expenses incidental to her purchase of an estate plan from United Financial in the total amount of $2495 for the estate plan marketed and sold to him by United Financial. He incurred $37,321 for the taxes he paid upon liquidating his stock and using the proceeds to purchase annuities sold by United Financial.

258. Leanna Thompson incurred expenses incidental to her purchase of an estate plan from United Financial in the total amount of $2,495.00 for the estate plan marketed and sold to her by United Financial, and $32,000 for the surrender fees and taxes she paid upon liquidating her annuities and

using the proceeds to purchase annuities sold by United Financial.

259. Helen Davis incurred expenses incidental to her purchase of an estate plan from United Financial in the total amount of $13,486.50; $1,650.00 for the estate plan marketed and sold to her by United Financial, $3,500 for forming a corporation, $8,336.50 for what she paid to attorney Carol Adinamas to correct the estate plan and corporate structure of her family business both of which were improperly done by United Financial.

260. Mary Reynolds incurred expenses incidental to her purchase of an estate plan from United Financial in the total amount of $ 5,250; $1,750 for the estate plan marketed and sold to her by United Financial and $3,500 for forming the C Corporation.

261. The Court should note that United Financial's corporate structure appears to have been carefully considered. The company president described United Financial as an insurance agency, "an insurance marketing entity." United Financial is currently owned by United Financial Resources, which entity, in turn, is held by the Jane A. Follett Family Limited Partnership The principals in the company are Richard Follett, his wife Jane Follett, their sons, Beau and Rich Follett and James Boyles, Jane Follett's brother. The company has been financially successful, and it appears as result thereof its principals have likewise been financially rewarded. In the event the Court imposes any monetary penalties or

obligations as a result of these proceedings, it may consider that such obligations extend to United Financial, the holding company, the Family Limited Partnership, and all of the principals personally, in order to better insure compliance and so they are not avoided through the use of the layers of corporate structure that have been put in place and avoidance of personal liability through the use of that structure. [Tr. 543:12-546]

B. Costs and Expenses Incurred by the ISBA other than Attorney Fees

262. United Financial consulted with various lawyers over the years regarding its business scheme. These letters were made of record by stipulation. Bruce Kotzan, Phillip Burroughs and William Hodes, the lawyers who advised the company, were all named as witnesses by Untied Financial, although only Mr. Hodes testified. The ISBA properly planned for a witness to counter this testimony and otherwise comment on the advice United Financial had relied upon from counsel. United Financial asserted the position that Ms. Sarah McShea was an expert that was being called to testify as to what constitutes the practice of law. Ms. McShea was called by the ISBA to rebut the testimony of Mr. Hodes, and to comment on the advice United Financial received from lawyers beginning in 1999. Her testimony was appropriate, helpful to the Commissioner and the expense legitimate.

263. The ISBA paid $ 25,881.80 in expenses directly to various vendors for copies and transcripts and to attorney Sarah McShea, who gave testimony in rebuttal to United Financial's evidence.

264. The ISBA paid $11,093.07 in expenses incurred by Bingham McHale LLP to counsel during the course of this matter for copies, long distance phone calls and other office expenses routinely billed.

C. Attorney Fees As Costs and Expenses in Admission and Discipline Rule 24 Cases

265. The terms "costs and expenses incurred by such hearing", in the context of Admis. Disc. R. 24 ("Rule 24"), which are to be paid by the losing party, have not been defined by the Court. The Commissioner is aware of the body of law on the issue of the recovery of attorney fees in litigation. Including the cost to the ISBA of engaging counsel to prosecute a UPL claim pursuant to Rule 24 is a matter of first impression.

266. United Financial was on notice of the UPL Committee's investigation. Like other individuals and entities that are brought to the attention of the UPL Committee, an effort to discuss the matter was made. United Financial refused to provide documents and information requested by the UPL Committee prior to any decisions being made to prosecute this case [Kolb, pp. 14, 66; ISBA Exhibit 23].

XIII. ADDITIONAL COMMENTS OF THE COMMISSIONER

1. The Report of the Commissioner relied heavily on Proposed Findings of Fact submitted by the parties. The ISBA format was adopted, then each finding by both parties was reviewed. Some were used verbatim, some were modified, some were omitted as inaccurate, and some original findings were added. Both parties offered numerous opportunities to cross the line from facts to conclusions, as one would expect with good advocates. A serious attempt to avoid drawing conclusions, and therefore invading the province of the Court, was made. However, there are probably instance where that effort was not completely successful.

2. The deposition of Jeffrey Kolb does not contain the exhibits introduced during his deposition. According to the court reporting service, Mr. Kolb retained them when the deposition was sent to him for signature. The service does, however, have copies. If the Court wished to see them, copies are available.

3. The Volume of Exhibits does not contain exhibits. Rather, each exhibit page says, "Retained by Commissioner Embrey." The Commissioer did not retain exhibits. Apparently they were retained by Bose McKinney and put in order after the hearing, They were sent to the Commissioner, along with

the exhibits of the parties, and are in the first of the three boxes of exhibits provided to the Court along with these findings.

4. There are a couple of places in the Findings where it appears a clerical person with little knowledge of Word was in charge. Most notably, the large blank space between V and VI. There are times when Word simply does not want to do as instructed and, since the Commissioner is both his own secretary and I.T. person, he takes full responsibility, but has no idea how to fix the problem.

5. The parties are not in agreement as to the payment of fees. If the Court orders fees, the parties will no doubt wish to have further hearing on the reasonableness of the fees.

Dated this 13th day of July, 2009.

/s/ Bruce C. Embrey
Bruce C. Embrey,
Commissioner

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No. 10-90

Supreme Court, U.S.
FILED
AUG 16 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UNITED FINANCIAL
SYSTEMS CORPORATION, *et al.*,

Petitioners,

v.

STATE OF INDIANA, EX REL.
INDIANA STATE BAR ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Indiana

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition, where unauthorized practice of law ("UPL") has been defined in Indiana to include the sale of estate plans by non-lawyers and where Petitioners' actions do not implicate fundamental First and Fourteenth Amendment Freedoms.

II. Whether Petitioners have presented compelling reasons to grant the Petition, where pursuant to a Court order requiring all settlement agreements be submitted to the Indiana Supreme Court for approval, the Indiana State Bar Association ("ISBA") made a partial settlement proposal at Petitioners' invitation.

III. Whether Petitioners have presented compelling reasons to grant the Petition, where the Indiana Supreme Court held all Petitioners jointly and severally liable for UPL based on each individual Petitioner's participation and role in UPL.

RULE 29.6 DISCLOSURE STATEMENT

The ISBA is not a subsidiary or affiliate of a publicly held company. No publicly owned company owns 10% or more of the membership interests of the ISBA.

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INTRODUCTION

The ISBA petitioned the Indiana Supreme Court to enjoin Petitioners' actions violating Indiana Rule of Admission and Discipline 24 ("Rule 24") (the "Enforcement Action"). The Indiana Supreme Court entered an order enjoining Petitioners' actions and ordering Petitioners to disgorge certain fees (the "Disgorgement Order"). The thrust of Petitioners' request for certiorari is to avoid disgorgement of unlawfully collected fees. The Petition should be denied because Petitioners have not demonstrated a cognizable violation of the United States Constitution so as to warrant review by this Court.

Petitioners now acknowledge that their business practices constituted UPL, but assert that prior to the Enforcement Action they were not on notice that their model of selling and delivering estate planning packages by non-lawyers, without attorney supervision, was UPL. Petitioners contend that because they did not know their actions amounted to UPL at the time, and they were not on notice that they could be ordered to disgorge those fees, it was a due process violation for the Indiana Supreme Court to order disgorgement. This argument fails because Petitioners were advised by outside counsel, and thus were on notice no later than 1999, that the business practices employed in Indiana would constitute UPL.

In addition, Petitioners had been conducting business in Ohio for many years. The Ohio Supreme Court held in 2005 that it was UPL for non-lawyers to

sell estate planning packages and provide legal advice regarding the same and imposed joint and several liability in its disgorgement order. *Cleveland Bar Ass'n v. Sharp Estate Servs., Inc.*, 837 N.E.2d 1183, 1188 (Ohio 2005). Similarly, in 2006, the Indiana Supreme Court issued *State ex rel. Ind. State Bar Ass'n v. Northouse*, 848 N.E.2d 668, 675 (Ind. 2006), citing to the Ohio case, and finding that disgorgement was an appropriate remedy for non-lawyers who sold estate planning documents and provided legal advice regarding the same. Finally, in 2009, two months prior to the hearing in this case, United Financial Systems Corporation ("UFSC") admitted that operating its business model in Ohio, and administering it from its Indiana headquarters, constituted UPL. Petitioners' claim that they did not or could not know that their actions constituted UPL in Indiana and that they had no notice that their unlawful actions could result in disgorgement is simply untenable.

STATEMENT OF THE CASE

Respondent adopts the facts contained in the Disgorgement Order and the Commissioner's Report, both of which are included in the Petition's Appendix. However, the following facts, downplayed or omitted by Petitioners, must be addressed for this Court to properly review the relevant legal arguments.

The facts supporting the finding of UPL in connection with Petitioners' business model and practices are:

1) Non-lawyer salespeople visit customers in their homes and sell estate plan packages on a commission-only basis without attorney supervision (App. 5);

2) The non-lawyer salespeople pushed the most expensive packages of estate documents offered by UFSC, which cost $2,695.00 in 2009, collected full or partial payment on the date of sale, and received commissions ranging from $750.00 to $900.00 (App. 5-6);

3) The non-lawyer salespeople collect personal and financial information from the customer (App. 5-6);

4) The information is routed to Indianapolis, where UFSC assigns each customer to the panel attorney contracted to complete the estate plan package for the customer (App. 6);

5) UFSC pays the panel attorney a fee of $225.00 to complete the estate plan package (*Id.*);

6) The lawyer in most cases has only one phone call with the client and fills in the blanks on forms with the documents, often containing provisions inapplicable to the client or even Indiana law (App. 6-7; 102, ¶ 144; 111, ¶ 176; 123, ¶ 216; 128, ¶ 214; 135, ¶ 237); and

7) UFSC pays another non-lawyer $75.00 to deliver the estate plan documents and assist the customer in executing the documents without any supervision by the panel attorney (App. 9).

Petitioners' statement of facts notes only that Attorney William Hodes advised and testified that their practices did not violate Rule 24. (Petition 3-6). Petitioners omit the evidence supporting the Disgorgement Order that another of UFSC's attorneys earlier advised that the business model employed here would be unlawful. Bruce Kotzan advised Petitioners in 1999 that "[t]here must be contact between the client and the attorney. In the event employees of the company engage in the gathering of information for the preparation of documents, these employees must be acting under the direction of the attorney." (App. 36, ¶ 17). Petitioners ignored this advice, as the business practices at issue in the Enforcement Action did not involve attorneys supervising the non-lawyers who interacted with the customers for whom the attorneys completed legal documents. (App. 5; 81, ¶ 98). Moreover, the "testimony of various panel attorneys reveals minimal independent consultation with clients and heavy reliance on the communications between the client and the company's salesperson." (App. 9).

Additionally, Petitioners fail to mention the fact that UFSC admitted the very practices at issue in the Enforcement Action constitute UPL in Ohio. *Ohio State Bar Ass'n v. United Fin. Sys. Corp.*, 921 N.E.2d 1054 (Ohio 2010) [hereinafter "*Ohio Bar v. UFSC*"]. UFSC agreed that its activities in Ohio involving the sale and delivery of estate plans by non-attorneys and "its activities at its principal place of business in the state of Indiana designed and intended to take effect

in Ohio," amounted to UPL. *Id.* at 1054-55. This admission, which was not disclosed to the ISBA by the Petitioners, came on March 31, 2009, nearly two months before the hearing on the merits in the Enforcement Action. Final Report of the Board on the UPL at 1, 921 N.E.2d 1054 (No. 09-1645), available at http://www.supremecourt.ohio.gov/tempx/651092.pdf.

Finally, the parties to the Enforcement Action participated in settlement discussions. Some individuals admitted violating Rule 24 and, jointly with the ISBA, submitted settlement agreements for approval to the Indiana Supreme Court, which were approved. (App. 55, ¶ 36). Petitioners and the ISBA did not engage in settlement discussions that reached the question of liability, but upon Petitioners' invitation, the ISBA proposed a settlement concept intended to resolve a dispute over the scope of possible disgorgement that could be ordered as a remedy by the Indiana Supreme Court. (Petition 5; App. 62, ¶ 45). While Petitioners quote a portion of the letter sent, they omit the portion that states it was written "on the invitation extended in [Petitioners' counsel's] recent letter to engage in the discussion of concepts for resolving the historical issues in the case." Reply Brief in Support of Motion to Dismiss or, In the Alternative, Motion to Strike, Ex. 1, *State ex rel. Ind. State Bar Ass'n v. United Fin. Sys. Corp.*, 926 N.E.2d 8 (Ind. 2010) (No. 94S00-0810-MS-551) [hereinafter "Settlement Letter"].

REASONS FOR DENYING THE PETITION

The Enforcement Action concerns the regulation of UPL – a matter regulated exclusively by the states. Petitioners' due process rights were not violated by the Disgorgement Order because: 1) Petitioners had due notice under Indiana and federal law that their actions constituted UPL and thus might result in an order of disgorgement; 2) there is no evidence of impermissible prosecutorial bias; and 3) Petitioners each personally participated in UPL and can be held jointly and severally liable for their actions. Accordingly, Petitioners have not demonstrated any "compelling reasons" to grant the Petition. *See* Sup. Ct. R. 10.

I. Those Committing UPL Are Not Entitled to Retain Unlawfully Collected Fees.

The Indiana Supreme Court has no original jurisdiction "except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law. . . ." Ind. Const. Art. 7 § 4. *See also* Ind. Code § 33-24-1-2. This Court has repeatedly held that the regulation of the practice of law is within the province of state courts. *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("That the states have the broad power to regulate the practice of law is, of course, beyond question."); *Brotherhood of Railroad Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1, 6 (1964) ("Virginia undoubtedly has broad powers to regulate the practice of law within its borders");

Sperry v. Florida, 373 U.S. 379, 383 (1963) (a state has a "substantial interest in regulating the practice of law within the state").

> The state interests implicated in this case are particularly strong. In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions.

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (U.S. 1978) (internal citations omitted).

In this regard, the Indiana Supreme Court has defined the practice of law as follows:

> The core element of practicing law is the giving of legal advice to a client and the placing of oneself in the very sensitive relationship wherein the confidence of the client, and the management of his affairs, is left totally in the hands of the attorney. The undertaking to minister to the legal problems of another creates an attorney-client relationship without regard to whether the services are actually performed by the one so undertaking the responsibility or are delegated or subcontracted to another.

Miller v. Vance, 463 N.E.2d 250, 251 (Ind. 1984) (quoting, *In the Matter of Perrello*, 386 N.E.2d 174, 179 (Ind. 1979)). Moreover, the Indiana Supreme Court has determined that where the filling in of blanks in legal documents prepared by attorneys

"involves considerations of significant legal refinement, or the legal consequences of the act are of great significance to the parties involved, such practice may be restricted to members of the legal profession." *Miller* at 251. (quoting, *State v. Indiana Real Estate Ass'n, Inc.*, 191 N.E.2d 711, 715 (Ind. 1963)). *See also In the Matter of Thrasher*, 661 N.E.2d 546, 549 (Ind. 1996) ("It is essential to the integrity of any legal practice that lawyers maintain independent professional judgment and not fully abdicate the responsibility of providing legal advice, guidance and expertise to nonlawyers."). Indeed, over seventy (70) years ago, the Indiana Supreme Court noted:

> The general meaning of the term, "practice law" or "practice of law," is of common knowledge. . . . [I]t is not confined to performing services in an action or proceeding pending in courts of justice, and, in a larger sense, it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court. *To "practice law" is to carry on the business of an attorney at law*; to do or practice that which an attorney or counselor at law is authorized to do and practice; to exercise the calling or profession of the law, usually for the purpose of gaining a livelihood, or *at least for gain;* to make it one's business to act for, and by the warrant of, others in legal formalities, *negotiations*, or proceedings.

Fink v. Peden, 17 N.E.2d 95, 96-97 (Ind. 1938) (emphasis in original). To argue that the conduct prohibited by Rule 24 is unclear and/or undefined is to ignore nearly a century's worth of Indiana jurisprudence regarding the practice of law.

The ISBA originally requested the disgorgement of fees collected for the sale of estate planning services dating back to 1995, when UFSC was founded and began using the business model addressed in the Enforcement Action. At oral argument before the Indiana Supreme Court, counsel for Petitioners argued that there was no notice that disgorgement of fees could be a remedy for Petitioners' actions occurring prior to 2006, but admitted that *Northouse*, 848 N.E.2d at 675, gave notice that disgorgement could be a remedy. Video of Oral Argument at 32:39, *State ex rel. Ind. State Bar v. United Fins. Sys. Corp.*, 926 N.E.2d 8 (No. 94S00-0810-MS-551), available at http://mycourts.in.gov/arguments/default.aspx?view=detail&id=990, [hereinafter "Oral Argument"]. While the Indiana Supreme Court noted that Petitioners could be required to disgorge fees collected prior to 2006, consistent with Petitioners' arguments, the Court limited the Disgorgement Order to those fees collected after the *Northouse* decision. (App. 22-23). The main thrust of Petitioners' argument is that they were not on notice that disgorgement was a potential remedy for their specific actions.

UFSC obtained legal advice in 1999 that the practices at issue in the Enforcement Action violated Rule 24. (App. 36, ¶ 17). At a minimum, Petitioners

learned in 2006 that non-lawyers may not sell estate plans in Indiana and that the Indiana Supreme Court cited with approval Ohio case law in defining the term "practice of law." *Northouse*, 848 N.E.2d at 672 (citing *Cleveland Bar*, 837 N.E.2d at 1186). The *Cleveland Bar* case held in 2005 that it was UPL to sell estate planning packages like Petitioners were doing in Indiana since 1995. 837 N.E.2d at 1186. Just recently, UFSC admitted the very practices at issue in Indiana amounted to the UPL in Ohio. *Ohio Bar v. UFSC*, 921 N.E.2d 1054. Thus, Petitioners' use of non-lawyers to give legal advice about estate planning and to market and sell estate planning packages without attorney supervision in Indiana, as in Ohio, constituted UPL. (App. 5 & 14). In light of these facts, Petitioners' attempt to attack the Disgorgement Order on the basis of lack of notice defies logic and raises the question of whether any justiciable case or controversy actually exists here.

A. Disgorgement of Fees Collected by Non-Lawyers for Legal Services Is Not a Penalty Subject to Criminal Due Process Standards, but a Restitutionary Measure.

Disgorgement is not recognized as a punishment, but rather is considered restitutionary. *Tull v. United States*, 481 U.S. 412, 424 (1987); *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) (restitution serves the public interest by restoring the status quo and ordering the return of that which rightfully

belongs to another; it is "within the highest recognized power and within the highest tradition of a court of equity.").

> Restitution [does not] qualify as a criminal punishment. Restitution has traditionally been viewed as an equitable device for restoring victims to the position they had occupied prior to a wrongdoer's actions. It is separate and distinct from any punishment visited upon the wrongdoer and operates to ensure that a wrongdoer does not procure any benefit through his conduct at the others' expense.
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> * * *
>
> *Restitution is not "punishment" within the meaning of the* Ex Post Facto *Clause.*

United States v. Newman, 144 F.3d 531, 538-39 (7th Cir. 1998) (internal citations omitted) (emphasis added).

Indiana similarly holds disgorgement is an equitable remedy designed to nullify any unjust enrichment when fees or other property are improperly acquired. *Ind. Fam. and Social Servs. Admin. v. Amhealth*, 790 N.E.2d 162, 169 (Ind. Ct. App. 2003) (Brook, C.J., concurring) ("Restitution is described as a return or restoration of what the defendant has gained in the transaction."). Where the remedy of disgorgement of fees is merited, such is not retributive in nature, but serves to "deter similar conduct in the future." *Northouse*, 848 N.E.2d at 674. Further, "[a]n action to compel a restitution of benefits accrued

need not be founded upon any supposed wrong." *Rollings v. Smith*, 716 N.E.2d 502, 507 (Ind. Ct. App. 1999). Because both federal and Indiana courts consider disgorgement to be restitutionary and not punitive, the same due process considerations that apply in the context of criminal and civil penalties do not apply here.

B. Disgorgement Is a Long-Standing Remedy in Indiana.

Although disgorgement of fees dating back to 1995 was at issue, Petitioners were ordered to disgorge only those fees collected after the issuance of the 2006 *Northouse* opinion (App. 23), which they admitted put them on notice that disgorgement was a potential remedy in cases involving UPL.[1] Oral Argument at 32:39. There was no lack of notice to Petitioners and thus no violation of due process.

Notwithstanding Petitioners' admission that *Northouse* put them on notice that disgorgement is a potential remedy for Rule 24 violations, disgorgement of fees collected for UPL in Indiana is not a recent development. First, the Indiana Supreme Court

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[1] The potential disgorgement amount is around $2.7 million in fees for the sale of estate planning documents. The Disgorgement Order notes that from October, 2006 through May, 2009, UFSC collected more than $29 million, which includes investments sold as a result of gaining access to the individual "clients" through the impermissible sale of estate planning documents. (App. 140-141, ¶¶ 252 & 255).

explained in *Northouse*, "[a]lthough the rule uses the terms 'enjoin' and 'injunction' when referring to the relief available and 'injunctions typically order those to whom they are directed to refrain from doing something, the relief afforded by equity may be extended to compel affirmative action when necessary.'" 848 N.E.2d at 674. *Northouse* provided notice that "[a]n injunction is a formal command of the court, directing the person named therein to refrain from doing certain specified acts . . . or, where the relief is mandatory in form, ***directing such persons to take certain steps to undo the wrong or injury with which they are charged.***" *Id.* (emphasis added). Thus, even before the *Northouse* decision, the Indiana Supreme Court had the authority pursuant to Rule 24 to order the disgorgement of unlawfully collected fees.

Moreover, Indiana courts have long recognized that "a person who was not duly admitted to practice law in this state, in conformity to the provisions of the statute, could not recover for legal services rendered." *See, e.g., Fink,* 17 N.E.2d at 97; *Harris v. Clark*, 81 Ind. App. 494, 496 (Ind. 1924) ("where a statute forbids carrying on a business without first procuring a license, paying a tax, and complying with prescribed tests, inspection, registration or the like contracts made by persons in carrying on such business are void, though the statute contains no express provision to that effect"). Accordingly, it was foreseeable that the Indiana Supreme Court would disgorge fees in the Enforcement Action – it was not a novel or

unprecedented concept and as explained in more detail below, Petitioners had notice that they were violating Rule 24. Thus, the Disgorgement Order does not violate Petitioners' due process rights.

C. Rule 24 Is Not Impermissibly Vague and Petitioners Cannot Claim an Unwitting Violation of Indiana's Prohibition Against the UPL.

1. A Rule 24 enforcement action is not criminal or quasi-criminal, thus the vagueness doctrine is not applicable.

Petitioners' argument that Rule 24 is impermissibly vague fails because Petitioners advocate for a level of specificity required only of criminal or quasi-criminal statutes. For Fourteenth Amendment purposes, courts demand less precision of statutes that impose only civil remedies, in contrast to criminal statutes, because their consequences are less severe.

> The degree of vagueness that the Constitution tolerates-as well as the relative importance of fair notice and fair enforcement-depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.

Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498 (1982).

A Rule 24 enforcement action, by nature, is not quasi-criminal, but is akin to an attorney or judicial disciplinary action. Just as disciplinary actions are intended to protect Indiana's citizens and courts from those who are not fit for membership in the bar, Rule 24 enforcement actions are intended to restrain or enjoin those individuals from the practice of law who are not qualified by virtue of the fact that they are not attorneys. The Indiana Supreme Court has recognized that:

> [D]isbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, *sui generis*, and result from the inherent power of courts over their officers. Such proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. *They are not for the purpose of punishment*, but rather seek to determine the fitness of an officer of the court to continue in that capacity and protect the courts and the public from the official ministration of persons unfit to practice.

In the Matter of Roberts, 442 N.E.2d 986, 987 (Ind. 1983) (emphasis added). The Indiana Supreme Court has held that "civil or criminal law definitions are generally not controlling in [disciplinary] actions. . . ." *In the Matter of Gerard*, 634 N.E.2d 51, 53 (Ind. 1994).

Similarly, Rule 24 enforcement actions are not intended "to find fault or assess liability but to protect the public from those not properly licensed or otherwise qualified to act as attorneys." *Northouse*, 848 N.E.2d at 674. If Rule 24 enforcement actions were indeed intended to punish those who practice law without a license, criminal laws regarding UPL in Indiana would be unnecessary. However, the Indiana General Assembly enacted a criminal UPL provision (Ind. Code § 33-43-2-1) and the Indiana Supreme Court enacted Rule 24. Each has its own distinct procedures and remedies. Requiring the same procedures and blurring the lines between the two provisions would render one superfluous.[2]

The Indiana Supreme Court has also noted that its "primary responsibility in admission and discipline matters is to protect the public against incompetent and unscrupulous professionals." *In the Matter of Fletcher*, 655 N.E.2d 58, 60 (Ind. 1995) (holding the Indiana Supreme Court had the power to discipline an individual who was licensed to practice law in Illinois for UPL in Indiana). Individuals who purport to provide legal advice, despite being unlicensed to practice law in Indiana, are within the purview of "incompetent and unscrupulous professionals" referred

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[2] In this regard, the Indiana Supreme Court has expressly stated that a Rule 24 enforcement action "does not preclude, and should not discourage, the State from filing criminal charges in appropriate cases against those who violate the prohibition on the unauthorized practice of law." *Northouse*, 848 N.E.2d at 675.

to by the Court in *Fletcher*. Moreover, the Indiana Supreme Court directly compared Rule 24 enforcement actions to disciplinary actions in determining the appropriate standard of proof in a Rule 24 enforcement action. *Ind. State Bar Ass'n v. Diaz*, 838 N.E.2d 433, 438 (Ind. 2005). Thus, Rule 24 enforcement actions are not quasi-criminal and do not require the same procedural safeguards as a criminal action.

Petitioners base their vagueness challenge to Rule 24 on *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Gonzales v. Carhart*, 550 U.S. 124 (2007); and *Conally v. General Constr. Co.*, 269 U.S. 385 (1926). Each of these cases is inapplicable to the Enforcement Action because each addressed the due process considerations at issue in enacting, interpreting, and enforcing ***criminal*** statutes. Because Rule 24 is not a criminal provision, these cases are inapposite.

Petitioners also cite *Flipside*, 455 U.S. at 499-500, for the proposition that quasi-criminal statutes are subject to the same strict vagueness test as criminal statutes. (Petition 14). This assertion overstates the Court's conclusion in *Flipside* that the admittedly "'quasi-criminal' [statute] and its prohibitory and stigmatizing effect may warrant a relatively strict test."[3] *Flipside*, 455 U.S. at 499. In any event,

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[3] Similarly, Petitioners' reliance on *Sedima v. Imrex Co.*, 473 U.S. 479, 492-93 (1985), is misplaced. The Court's concern in that case was whether statutorily mandated civil penalties in a RICO action could be limited to instances in which the defendant had previously been found guilty in a criminal matter of a

(Continued on following page)

Rule 24, which is grounded in Indiana's Constitution, is not quasi-criminal, but quasi-disciplinary. *See* Ind. Const. Art. 7 § 4. Thus, Petitioners' argument that the prohibition on UPL in Indiana is unconstitutionally vague fails.

While courts have recognized a limited application of the vagueness doctrine to cases involving certain fundamental freedoms, Petitioners have not asserted, nor can they, that Rule 24 affects these rights. Petitioners seek review of Rule 24 under the standards set forth in *NAACP v. Button*, 371 U.S. 415 (1963), and *Trainmenr*, 377 U.S. 1. As asserted by Petitioners, both cases apply the vagueness doctrine to statutes governing the practice of law. However, *Button* analyzes a statute which limited First Amendment rights.

> The objectionable quality of vagueness and overbreadth does not depend on absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, ***in the***

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related violation. *Sedima* at 491. The Court found, however, that criminal conviction was not necessary in order to impart civil penalties under a civil standard of proof. *Id.* at 491. Almost as an aside, and without determining whether the availability of treble damages as a civil remedy was quasi-criminal in nature, this Court reasoned that the due process concerns at issue could be repaired by raising the standard of proof in the civil actions rather than by requiring a previous criminal conviction in order to utilize the civil remedy. *Id.* at 492-93.

> ***area of First Amendment freedoms***, the existence of a penal statute susceptible of sweeping and improper application.[4]

Button, 317 U.S. at 432-33 (emphasis added). Similarly, *Trainmen* considers an injunction which limited First and Fourteenth Amendment rights. *Trainmen* at 1118. The scope of Rule 24 does not reach First or Fourteenth Amendment freedoms, and Petitioners present no argument that it does reach such freedoms.[5] Neither their life, liberty, or property is at risk here. Disgorging ill-gotten gains is not the taking of property. *See, e.g., Porter*, 328 U.S. at 402. Thus, because Rule 24 enforcement actions are neither criminal nor quasi-criminal, the vagueness doctrine does not apply.

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[4] Petitioners inexplicably exclude this critical reference to the First Amendment in their analysis of *Button*. (Petition 14).

[5] Petitioners portray their conduct as that of a simple lawyer-referral service, rather than owning up to the elaborate scheme involving a sales force of non-lawyers who give legal advice without attorney supervision. (Petition at 27). Such a characterization of the UFSC model invites a misapplication of many cases cited by Petitioners in their favor. Specifically, *United Transportation Union v. State Bar of Mich.*, 401 U.S. 576, 582-84 (1971); *Button*, 371 U.S. 415; *Trainmen*, 377 U.S. 1; and *United Mine Workers of America*, 389 U.S. 217, 221-22, each involve referral systems and First Amendment speech and assembly issues. None of these cases are analogous to the UFSC system of selling estate planning services without an initial legal analysis conducted by a licensed attorney.

2. Even if the vagueness doctrine were to apply to Rule 24, the rule is not vague on its face, or as applied to Petitioners' conduct.

Petitioners' attack on the alleged vagueness of Rule 24 fails. First, Rule 24 is not facially vague because, as outlined above, the Indiana Supreme Court has defined Rule 24 through decades of case law, and these definitions provide sufficient specificity as to the definition of the practice of law in Indiana. Second, Rule 24 is not vague as applied to Petitioners because their practices fell squarely within the Indiana Supreme Court's definition of the practice of law. Moreover, UFSC's recent admission that identical practices amounted to the UPL in Ohio, coupled with Petitioners' employee training regarding the practice of law, disclaimers regarding the practice of law, and legal advice warning them that their practices flirted with Rule 24 violations, defeat their claim that they could not discern what conduct was prohibited.

a. The Indiana Supreme Court has defined UPL so that Rule 24 is not unconstitutionally vague on its face.

A statute is unconstitutionally vague where its language does not convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, or stated otherwise, where its language is such that people of

common intelligence must necessarily guess at its meaning. *See Keyishian v. Board of Regents of University of State of N.Y.*, 385 U.S. 589 (1967). However, a statute is not unconstitutionally vague when an ordinary person exercising ordinary common sense can sufficiently understand and comply with it. *See Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

Generally the decisions of this Court "upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning . . . or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ." *Cline v. Frink Dairy Co.*, 274 U.S. 445, 459 (1927) (citing *Nash v. United States*, 229 U.S. 373, 377 (1913)). Judicial interpretations of a statute can settle the meaning of terms employed therein. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1616 (2010). *See also Bellows v. Merchants Despatch Transp. Co.*, 257 A.D. 15, 16 (N.Y. App. Div. 1939) (if the meaning of terms employed in the statute "have long been recognized in law and life", they will be considered sufficiently definite), *judgment aff'd*, 27 N.E.2d 440 (1940); *Associated Builders and Contractors, Saginaw Valley Area Chapter v. Director, Dept. of Consumer & Indust. Serv.*, 705 N.W.2d 509 (Mich. Ct. App. 2005) (a statute is sufficiently definite for purposes of due process if its meaning can be fairly ascertained by reference to judicial interpretations, the common law, dictionaries,

treatises, or the commonly accepted meanings of words).

In this regard, "[f]or the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation '[this Court] must take the statute as though it read precisely as the highest court of the State has interpreted it.'" *Wainright v. Stone*, 414 U.S. 21, 22-23 (1973). "When a state statute 'has been construed to forbid identifiable conduct so that 'interpretation by [the state court] puts these words in the statute as definitely as if it had been so amended by the legislature,' claims of impermissible vagueness must be judged in that light." *Id.* a 23.

As noted previously herein, *Northouse* is the most recent pronouncement of the parameters of the definition of the practice of law in Indiana, which has long been defined to include giving "legal advice and counsel". *Fink*, 17 N.E.2d at 96. *Northouse* specifically addressed a situation in which a non-lawyer met with clients and discussed the clients' current estate planning efforts, collected information, and discussed the idea of estate planning documents such as living trusts, wills, and powers of attorney with clients. 848 N.E.2d at 670. During this same visit, the non-lawyer collected payment from the clients for the estate planning documents he had recommended during their meeting. *Id.* The non-lawyer then modified forms that had been previously drafted by an attorney and met with the clients again to assist them in executing the legal documents. *Id.* at 671. The

Indiana Supreme Court cited prior Indiana case law in finding that the practices described in the *Northouse* opinion amounted to UPL. *Id.* at 672 (citing *Miller*, 463 N.E.2d at 251 (giving legal advice, managing the affairs of a client, and ministering to the legal affairs of another is the practice of law); *State ex rel. Pearson v. Gould*, 437 N.E.2d 41, 42 (Ind. 1982) (giving advice as to the contents and legal effect of a will is the practice of law)). The *Northouse* opinion recognized decisions from other jurisdictions in finding UPL where non-lawyers sold estate planning services. *Id.* (citing among others, *Cleveland Bar,* 837 N.E.2d at 1186). *See also Hackin v. Arizona*, 389 U.S. 143 (1967) (appeal dismissed for "want of a federal question" on a claim that Arizona UPL statute was "too vague and indefinite" to meet Constitutional standards).

b. In addition to the plethora of case law defining UPL in Indiana, Petitioners knew that their conduct was prohibited because they obtained legal advice as to legality of their practices and admitted that identical conduct constituted UPL in Ohio.

Petitioners' dismay and surprise that their actions in Indiana amounted to UPL is not credible because UFSC admitted in Ohio that the identical business scheme was UPL. The model is recited at *Ohio Bar v. UFSC*, 921 N.E.2d at 1054-55. (*Cf.* App.

30, ¶ 2-36, ¶ 16). The Supreme Court of Ohio accepted and approved the proposed consent decree submitted by UFSC and the Ohio State Bar Association setting forth the essential elements of UFSC's estate planning practices, which closely mirror the practices recited in the Commissioner's Findings of Fact and the Disgorgement Order.[6] Given UFSC's admission that virtually the same conduct at issue here was UPL in Ohio, Petitioners' claim that they could not have known their conduct in Indiana was UPL is dubious at best.

Moreover, Petitioners solicited (and ignored) legal advice from Attorney Bruce Kotzan, who advised in 1999:

> It is my opinion that you can employ attorneys to represent individuals in the course of your marketing of estate planning products, but the lawyer's representation of the clients must truly be independent. The attorney must represent the client and not the company. There must be contact between the client and the attorney. In the event employees

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[6] The Ohio rules prohibiting UPL, like Indiana's are judicially defined. While Ohio's Gov. Bar R. VII(2)(A) defines the UPL as "the rendering of legal services for another person by any person not admitted to practice in Ohio," the Supreme Court of Ohio turns to its own precedent to further specify that definition. *See, e.g.*, *Cincinnati Bar Ass'n v. Kathman*, 748 N.E.2d 1091, 1095 (Ohio 2001) (citing *Trumbull Cty. Bar Ass'n v. Hanna*, 684 N.E.2d 329, 331 (Ohio 1997) for the proposition that non-attorneys engage in UPL when they market and sell living trusts).

> of the company engage in the gathering of information for the preparation of documents, these employees must be acting under the direction of the attorney.

(App. 36, ¶ 17). The Indiana Supreme Court agreed that "UFSC's business model has marginalized the attorney's role to such a degree as to cross the line of permissible practices." (App. 13-14).

In advising UFSC about its business model and practices, UFSC's inside and outside counsel could have easily found Indiana case law such as *State ex rel. Pearson v. Gould*, 437 N.E.2d 41, 42 (Ind. 1982), which held that preparing and drafting a will, and giving legal advice about the contents and effect of a will, constitute the practice of law. Petitioners similarly could have reviewed *Northouse*, which held that "giving advice as to the contents and legal effect of a will constitute the practice of law." 848 N.E.2d at 672. Indeed, because of the similarity of the facts in *Northouse* to Petitioners' business scheme, the Indiana Supreme Court noted that *Northouse* "should have put UFSC on clear notice that its practices were unlawful. Regardless of whether UFSC acted properly prior to *Northouse* to ascertain whether its practices were lawful, the illegality of UFSC's business model certainly should have been apparent after *Northouse*." (App. 22-23).

Apparently in anticipation of litigation, UFSC hired Professor William Hodes. (App. 52). Hodes testified at length that Petitioners' business model

and practices did not violate Rule 24. (App. 52, ¶¶ 26, 28). The Commissioner then admitted rebuttal testimony by Sarah McShea, who testified that Petitioners' practices amounted to UPL. (App. 52, ¶ 26). Petitioners' argument that the testimony of Ms. McShea proves the confusing nature of Indiana's UPL restriction is a *non sequitur*, as borne out by UFSC's admission in Ohio that it knew its business practices amounted to UPL. *Ohio Bar v. UFSC*, 921 N.E.2d at 1054-55.

In addition to the fact that UFSC admitted its practices violated the prohibition on UPL in Ohio, UFSC devoted substantial resources to training its employees as to the boundaries of the practice of law and included disclaimers in its consumer materials, purportedly to alert customers that its representatives were not engaging in the practice of law. (App. 70, ¶ 62; 78, ¶ 88). If the definition of the practice of law in Indiana is truly so mystifying that Petitioners could not discern the line dividing permissible and prohibited conduct, it is incredible that they would tread so close to the line and train employees as to where that boundary lies. *See Nash v. United States*, 229 U.S. 373, 377 (1913) ("the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree").

Petitioners' argument that not even the facts of *Northouse* put them on notice that their practices were illegal essentially advocates for a legal standard requiring an Indiana case presenting the exact same facts at issue for a Rule 24 violator to have received

sufficient notice that its actions may lead to disgorgement of fees. (Petition at 21). *Northouse* already presented the similar situation of a non-attorney providing legal advice and selling legal documents, including wills and trusts, to individuals. (App. 13). The Ohio cases from 1997, 2001, and 2005 also presented similar sales of estate plan packages as those sold by Petitioners. The due process requirements applicable to a state's governance of the practice of law within its boundaries do not require further specificity of the offense in this context. *Flipside*, 455 U.S. at 498 ("The degree of vagueness that the Constitution tolerates-as well as the relative importance of fair notice and fair enforcement-depends in part on the nature of the enactment."). Petitioners had fair notice and received all the process that was due. Rule 24, and the definition of the practice of law in Indiana are sufficiently specific that Petitioner's request for certiorari should be denied.

II. The Indiana Supreme Court Found Petitioners' Accusations of Prosecutorial Misconduct by the ISBA to be Without Merit.

The ISBA's settlement demand did not violate the Petitioners' due process rights. Though not mentioned in the Petition, Petitioners' argument of prosecutorial misconduct has already been deemed "baseless" and "without merit" by the Indiana Supreme Court. While Petitioners contend that the ISBA's settlement proposal evidences prosecutorial bias, the Indiana Supreme Court specifically found that the effort was not

"indicative of any improper self-interest by the ISBA in bringing unauthorized practice action under Rule 24." (App. 17). In an attempt to resolve some of the issues in the case, and in response to an "invitation extended" by counsel for Petitioners, the ISBA proposed various settlement concepts which would ultimately be presented to the Indiana Supreme Court for approval if they evolved into an agreement between the parties. The Petitioners rejected this effort. Settlement Letter at 1.

The ISBA had no authority to independently resolve the Enforcement Action. The Indiana Supreme Court's Order of January 30, 2009, encouraged settlement and specifically required the Court's approval of any settlement. January 30, 2009 Order, ¶ 7. In essence, the settlement process was akin to a consent judgment – the parties were to present an agreement as to the violation and appropriate sanction to the Indiana Supreme Court, which retained the ultimate discretion to accept or reject that agreement. The notion that the ISBA was improperly attempting to use Rule 24 for financial benefit is directly at odds with the reality that the Indiana Supreme Court approved all settlements. Moreover, this assertion was flatly rejected by the Commissioner and the Indiana Supreme Court. (App. 16-18; 61-63, ¶¶ 41-47). There was no basis for Petitioners' claim that this action was predicated on such an attempt. (App. 16-18; 61-63, ¶¶ 41-47).

The parties' settlement discussions did not reach the merits of the charged Rule 24 violations. Although the ISBA has the authority to bring a Rule 24 enforcement action, the Indiana Supreme Court is the entity that ultimately decides whether Rule 24 was violated and the appropriate remedy. The ISBA was not in a position to drop all the claims, it was merely able to stipulate certain facts and issues, in a joint effort to streamline litigation and curtail the expenditures of time and resources by the Indiana Supreme Court, the Commissioner, and the parties. The settlement discussions at no point contemplated that the alleged rule violations would be reduced. Indeed, there is no concept such as a "lesser included charge" for which Petitioners could have bargained. A respondent to a Rule 24 enforcement action has either violated Rule 24 or has not; there is no middle ground.

The primary case Petitioners rely on in support of their position, *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), concludes that the strict requirements against the impermissible risk of bias "designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity." *Id.* at 248. The requirements against bias have been extended to prosecutors and those in quasi-prosecutorial roles in instances where the decision whether to initiate or reduce criminal charges can result in some pecuniary gain to the prosecutor. *See, e.g., Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 805

(1987). As explained in *Young*, a prosecutor representing the interests of a private party in a related civil action "may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client. Conversely, a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges." *Id.*

The ISBA's role in a Rule 24 enforcement action is not subject to these concerns because the ISBA could not have unilaterally settled this Enforcement Action. The ISBA had not previously engaged in settlement negotiations presenting an opportunity for financial gain via a Rule 24 enforcement action. (App. 16-18; 61-63, ¶¶ 41-47). The appearance of impropriety warned against in *Young* does not exist because the Indiana Supreme Court ordered that it must approve all settlement agreements. This arrangement guards against even the appearance of impropriety. *Young*, 481 U.S. at 811.

This case does not present a situation akin to *Young*, in which an individual prosecuting an action could realize a private benefit from the result. Rather, as in *Marshall*, "no governmental [or other] official stands to profit economically from vigorous enforcement" of Rule 24. 446 U.S. at 239. In *Marshall*, this Court upheld the propriety of a statutory provision requiring civil penalties be returned to the governmental agency charged with investigating and enforcing child labor violations as reimbursement for the

expenses incurred in the enforcement process. *Id.* at 247. As explained in *Tumey v. Ohio* "the legislature of a State may, and often *ought to*, stimulate prosecutions for crime by offering to those who shall initiate and carry such prosecutions rewards for thus acting in the interest of the State and the people." *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (emphasis added). As in *Marshall*, the ISBA does not ultimately assess a Rule 24 violation or determine the appropriate sanction; the Indiana Supreme Court reserves this function to itself. *See Marshall* 446 U.S. at 247 ("The function of assessing a violation is akin to that of a prosecutor or civil plaintiff", and the alleged violator is entitled to a hearing before a judge).

The ISBA is merely the relator of the State's interest in protecting Indiana citizens from the harmful effects of UPL. To the extent that the ISBA's role in the Rule 24 proceedings can be deemed analogous to that of a criminal prosecutor, Petitioners failed to develop any facts or law demonstrating that the ISBA was unfairly interested in the outcome of this action. The ISBA had no expectation that initiating the Enforcement Action would result in financial gain and there was no evidence of prosecutorial bias.

III. The Indiana Supreme Court Correctly Held the Individual Petitioners Jointly and Severally Liable for the Disgorgement of Fees and Payment of Costs.

Petitioners incorrectly argue that the Indiana Supreme Court did not enter any findings to support the imposition of joint and several liability for the disgorgement of fees and costs over the individual Petitioners. (Petition, 35). Both the Commissioner's Findings of Fact and the Indiana Supreme Court's opinion offer generous factual support for finding the individual Petitioners just as liable as UFSC for engaging in the UPL. Indeed, contrary to the Petitioners' argument, this is not a case of "guilt by association"[7] – rather, the individual Petitioners here *are* the "association." (Petition, 38).

In a practical sense, UFSC cannot sit for the bar exam, and thus, technically cannot practice law. *See Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, 158 (Ind. 1999) (noting that "only a natural person can be

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[7] The cases cited by Petitioners in support of this argument, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) and *Rizzo v. Goode*, 423 U.S. 632 (1976), are inapposite. The *Claiborne* case dealt with the exercise of First Amendment freedoms in connection with legitimate activities. Here, there are no First Amendment concerns and the activity at issue is not lawful. Similarly, the *Rizzo* case involved the issuance of an injunction against persons who had no connection with the activity being enjoined. Here, the individual Petitioners are not innocent bystanders – they were the individuals at UFSC that orchestrated, participated in, and profited from, the unlawful activity.

admitted to the bar"). However, the Indiana Supreme Court has noted that, in the context of the practice of law, "agency doctrine permits an unlicensed legal entity to employ licensed agents to perform those acts requiring a license." *Id.* at 160 (internal citation omitted). In other words, to the extent a corporation is said to practice law, it does so through its agents. On this point, the Court stated:

> Regardless of whether a partnership, a professional corporation, an insurance company, or any other legal entity may be said to be practicing law in some sense, **we believe the proper focus of the unauthorized practice inquiry is whether the challenged activity results in the "unauthorized" practice by the *individuals* involved**.

Id. (emphasis added). Ignoring this precedent, the individual Petitioners engage in misdirection by attempting to now distance themselves from the UFSC entity – the very entity they owned, managed, worked for, and/or profited from. Consistent with the standard set forth in *Wills*, the examination of UFSC's business model and practices in the underlying Enforcement Action necessarily centered around the activities being performed by the individual Petitioners who acted on behalf of UFSC.

During the course of the proceedings, including the 3-day evidentiary hearing, the ISBA proved that UFSC's business model and practices constituted UPL. For instance, it was established that non-lawyer

salespeople without attorney supervision engaged in UPL by, among other things, marketing and selling estate plans, providing legal advice, and explaining the relevance and purpose of legal documents to customers. (App. 29-38, ¶¶ 1-23). It logically follows that Petitioners Jody Waugh, Raymond Phillips and James Boyles, who worked as non-lawyer salespeople for UFSC, engaged in acts constituting UPL in their respective capacities.[8]

Moreover, several of the individual Petitioners owned and/or managed the UFSC enterprise and facilitated UPL. Since the company's inception in 1995 to late 2008, Petitioners Richard Follett and Jayne Follett were principals of UFSC, whose sole shareholder was the Jayne A. Follett Family Limited Partnership ("Follett Family L.P."). (App. 71, ¶ 63). Then, after a curious corporate restructuring of UFSC during the pendency of the Enforcement Action, UFSC became owned by United Financial Resources, which in turn, was held by the Follett Family L.P. (App. 71, ¶ 64). The members of the Follett Family L.P. include Petitioners Dick Follett, Jane Follett, Richard L. Follett II, Beau Follett, and James Boyles. (App. 71, ¶ 64). These individuals (who have an ownership interest in UFSC), in addition to Petitioners Raymond C. Phillips, Gary Lovelady, Sharon Dorsey, and Sherry Jordan, formed UFSC's home

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[8] Each of these Petitioners was specifically implicated in UPL activities concerning certain UFSC customers that were named in the ISBA's Petition. (App. 98-138, ¶¶ 134-248).

office senior management during the relevant time period – a fact stipulated by the parties. (App. 72, ¶ 65). John Joyce was subsequently hired as a Panel Attorney for UFSC in February 2000.[9] (App. 74, ¶ 79).

Referring to non-lawyer salespeople and Panel Attorneys, the Indiana Supreme Court noted that "all of these persons are essential to UFSC's core business model." (App. 7). In like fashion, each of the individual Petitioners also played a role in the UFSC business model, whether in training, managing and/or aiding non-lawyer salespeople, or in marketing and selling estate plans to customers while dispensing legal advice in the process. Ultimately, all of the Petitioners share at least one thing in common – they each personally profited from the unlawful activities of the UFSC enterprise, whether in the form of a dividend, distribution, salary, or commission. As the Disgorgement Order recognizes, the individual Petitioners should not be allowed to profit from these illicit gains.

Notwithstanding Petitioners' argument to the contrary, the State is not required to pierce the corporate veil in order to impose liability on an individual that engages in UPL on behalf of a corporation. Petitioners cite to no authority for this proposition. Individuals, just like the entities they work for, are

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[9] On April 17, 2009, the ISBA moved to amend its Petition to include claims against the named Panel Attorneys, including John Joyce, for aiding or assisting non-lawyers in the UPL. The Commissioner granted the ISBA's motion on May 18, 2000.

equally subject to the restrictions Rule 24 imposes and cannot shield themselves from liability by simply hiding behind a corporate structure. Indeed, in the context of a UPL action, it is not unique to hold individual violators liable despite the fact they were acting on behalf of a corporation. *See, e.g., Cleveland Bar*, 837 N.E.2d at 1187-88 (imposing joint and several liability on the individual respondents of a trust mill in a UPL action). Like the individual respondents' relationship with the entity in *Cleveland Bar*, the individual Petitioners here were under contract with UFSC, were agents of UFSC, and "received extensive training from [UFSC] on marketing and selling trust and estate plans to customers." *Id.* at 1187.

In imposing joint and several liability, the Ohio Supreme Court in *Cleveland Bar* noted, *inter alia*, that the respondents' violations "were flagrant because they aggressively targeted customers even after [a prior 2001 Ohio decision], which warned that trust-mill operations are UPL violations." *Id.* at 1188. The Court also held that the individual respondents had "willfully defrauded their customers by selling trusts and estate documents without authorization." *Id.* The instant case is analogous in virtually every way. The individual Petitioners were agents of UFSC, they continued to aggressively target customers despite the decision in *Northouse* in 2006. As in *Cleveland Bar*, joint and several liability is warranted here.

Finally, the notion that the individual Petitioners were not afforded "even the basic procedural safeguards" and were given "*little if any opportunity to* conduct discovery" (Petition, 39) is unsupported by the record. First, counsel for Petitioners admitted during oral argument before the Indiana Supreme Court that formal discovery in this matter was not necessary and that the parties fully cooperated in informal discovery efforts. Oral Argument at 45:19. Further, these individuals were named respondents in the ISBA's Petition since its inception and were represented by the same counsel that defended UFSC. Through their counsel, they participated in the proceedings, engaged in discovery, and had an opportunity to present their defense at the 3-day evidentiary hearing.[10] Prior to the hearing, they filed seven (7) pre-trial motions, including a motion to dismiss the Enforcement Action, which was denied. (App. 57, ¶ 40).

After conducting the evidentiary hearing including three days of testimony and hundreds of UFSC's internal documents, the Commissioner correctly entered findings detrimental to the Petitioners. The Indiana Supreme Court reviewed the record and held that Petitioners engaged in UPL. The individual

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[10] Despite being individually named as respondents in the enforcement action, Petitioners Jayne A. Follett, Sharon Dorsey, Sherry Jordan, and Gary Lovelady did not personally appear for the evidentiary hearing. (App. 56, ¶ 37).

Petitioners received appropriate due process, procedural and substantive, and cannot now argue otherwise.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that Petitioners' request for certiorari be denied.

Respectfully submitted,

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No. 10-90

Supreme Court, U.S.
FILED
AUG 26 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UNITED FINANCIAL SYSTEMS, CORPORATION, *et al.*,

Petitioners,

v.

STATE OF INDIANA, ex rel. INDIANA STATE BAR ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Indiana

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Petitioners, United Financial Systems, Corporation ("UFSC"); Richard Follett; Jayne A. Follett; Richard L. Follett II; Beau R. Follett; James Boyles; Raymond C. Phillips; Sharon Dorsey; Sherry Jordan; Jody Waugh; Gary Lovelady; and John Joyce (the "Petitioners"), respectfully submit their reply to the brief in opposition filed by Respondent, State of Indiana, ex rel. Indiana State Bar Association (the "ISBA").

I. EVEN THE ISBA FAILED TO IDENTIFY ANY INDIANA CASE LAW PROHIBITING THE CONDUCT AT ISSUE

The ISBA claims that Rule 24 is not vague because "the Indiana Supreme Court has defined Rule 24 through decades of case law." Br. in Opp., p. 20. While it is true that the court has defined some conduct as the unauthorized practice of law ("UPL") through case law, the ISBA fails to mention that there are ***no*** Indiana cases addressing facts similar to the ones in this case – where all legal advice and drafting was performed by licensed Indiana attorneys.

As a preliminary matter, the ISBA's assertion that Rule 24 is clearly defined is contrary to assertions that its officers have made on its behalf in the past. In a 2002 letter to the American Bar Association

("ABA"),[1] Attorney John Conlon, the then-chair of the ISBA's UPL Committee, submitted comments regarding the ABA's proposed Model Definition of the practice of law. Conlon stated in part:

> In my view, the present situation is that there is a distinct lack of clarity and uniformity in the UPL area throughout the country. What constitutes UPL activity varies widely among the states. The result is that there exists a crazy quilt of case law and interpretation of existing professional rules that **has left both the general public as well as members of the bar confused about what actually constitutes the unauthorized practice of law**.
>
> Also adding to the problem is that state courts tend to be very tepid in their UPL decisions. **In Indiana, while our state supreme court generally has not ventured beyond the context of the specifics of the facts presented in UPL cases to lay down many "markers" which could be used to judge UPL conduct in other types of situations – particularly with regard to non-lawyers who may be engaged in the unauthorized practice of law**. A more expansive definition of what constitutes the practice of law could only

[1] This letter was Exhibit 3 to Petitioners' "Reply Brief In Support Of Motion to Dismiss Or, In the Alternative, Motion to Strike" during the proceeding below. *See also* Defendant's Trial Exhibit 149.

> serve to provide clarity not only to the general public and members of the bar, but also to state courts that must deal with UPL issues.

(emphases added). The concerns expressed by Conlon in his capacity as the chair of the ISBA's UPL Committee highlight the deficiencies of Rule 24, which does not provide any guidance as to what conduct is specifically prohibited and instead merely provides a blanket prohibition of "the unauthorized practice of law." Ind. R. Admis. B. & Disc. Att'y 24. Although the ISBA contends that UPL has been defined by a "plethora of case law," (Br. in Opp. at 23), as the letter from the ISBA's former UPL Committee Chair recognizes, UPL does not have a settled legal meaning, and reasonable minds can differ as to what conduct constitutes a violation.

The only Indiana case upon which the ISBA relies for its argument that the Petitioners were on notice that their conduct was prohibited is *State of Ind. ex rel. Ind. State Bar Assoc. v. Northouse*, 848 N.E.2d 668 (Ind. 2006). Br. in Opp. at 22-23. In *Northouse*, the court found non-attorneys guilty of UPL for drafting estate plans and providing legal advice ***without any attorney review or involvement***. *Northouse*, 848 N.E.2d at 673. In contrast, here, all legal documents that UFSC's customers received were drafted by Indiana attorneys after the attorney contacted the individual and assessed his needs using independent professional judgment. The fact that attorneys drafted the legal documents and

provided the legal advice is a crucial distinction between the facts of this case and the facts of *Northouse*. The ISBA makes no attempt to explain how a case prohibiting the drafting of estate plans by non-attorneys absent attorney involvement puts the public on notice that businesses are prohibited from referring individuals to attorneys for estate planning services. There was no Indiana case law regarding the role that non-attorneys could play in the marketing of estate planning assistance services, where all individuals were referred to attorneys who drafted estate plans on a case-by-case basis.

The ISBA also argues that the Petitioners were on notice that their conduct was prohibited in Indiana because Ohio prohibits such conduct. Br. in Opp. at 26-27. The ISBA cites to the consent decree UFSC entered into in Ohio admitting that its business model was UPL under Ohio law as evidence that the Petitioners knew their conduct was unlawful in Indiana. *Id.* The consent decree upon which the ISBA relies is not part of the record, and the Indiana Supreme Court specifically rejected the ISBA's request to make it part of this record. (ISBA's October 9, 2008 Motion For Leave to Supplement the Record; November 20, 2009 Order denying Motion.) Regardless, the fact that UFSC admitted to UPL under Ohio law has no bearing on whether the Petitioners were on notice that their conduct was prohibited in Indiana, because Indiana and Ohio law contained important distinctions.

For example, Ohio prohibits attorneys from assisting organizations that pay for legal services to others to promote use of the lawyer's services, but Indiana law does not contain a parallel prohibition. *See* Ohio Disciplinary R. 2-103(D). Similarly, Ohio law prohibits attorneys from requesting that an organization recommend the lawyer's services, whereas Indiana law generally only limits recommendations from lawyer referral services. *See* Ohio Disciplinary R. 2-103(C); Ind. Prof. Cond. R. 7.3. Most significantly, in 2007 the Ohio Supreme Court made it clear that business models like the one used by UFSC would be prohibited in Ohio.

Specifically, in *Cincinnati Bar Assoc. v. Heisler*, 866 N.E.2d 490 (Ohio 2007) and *Disciplinary Counsel v. Kramer*, 866 N.E.2d 498 (Ohio 2007), the Ohio Supreme Court indicated that a company would commit UPL if a non-attorney gave a presentation about probate to consumers and collected a check, even if an attorney later dispensed legal advice and prepared all legal documents, essentially creating a *per se* UPL violation for providing in-person presentations about probate. After UFSC became aware that presentations by non-attorneys will constitute UPL under Ohio law even in the absence of proof that the non-attorney gave legal advice or drafted legal documents, UFSC began exiting the Ohio market, with its exit concluding in 2008. Because of the Ohio Supreme Court opinions that put it on notice that its conduct was prohibited, UFSC admitted that its business model was UPL under Ohio law, and UFSC was

permitted to exit the Ohio market without imposition of any monetary penalty.

In contrast, the Petitioners were not on notice that UFSC's business model was unlawful in Indiana because Indiana had never previously held that in-person presentations regarding probate were a violation of Indiana's UPL prohibition. This crucial difference between Indiana and Ohio law renders UFSC's admission that it engaged in UPL under Ohio law irrelevant to this proceeding. Furthermore, as the ISBA's former UPL Committee Chair explained to the ABA, there is a distinct lack of clarity and uniformity regarding UPL throughout the country. What constitutes UPL varies widely among States, resulting in a crazy quilt of case law and interpretation of professional rules that has left both the public and attorneys confused about what constitutes UPL. Indeed, Montana even provides a licensing procedure by which non-attorneys can register to sell trusts, indicating that UFSC's business model is likely lawful in Montana. Mont. Code § 30-10-904. Individuals should not be required to guess whether Indiana will follow Ohio or Montana law. Moreover, only one of the Petitioners in this proceeding was a party to the Ohio proceeding – UFSC. The remaining Petitioners were not parties to the Ohio proceeding or the consent decree, and any admissions made cannot be held against them.

The ISBA also criticizes the UFSC Respondents for purportedly "ignoring" the advice of Attorney Bruce Kotzan (Br. in Opp. at 24-25), who advised UFSC:

> It is my opinion that you can employ attorneys to represent individuals in the course of your marketing of estate planning products, but the lawyer's representation of the clients must truly be independent. The attorney must represent the client and not the company. There must be contact between the client and the attorney. In the event employees of the company engage in the gathering of information for the preparation of documents these employees must be acting under the direction of the attorney.

After UFSC received Kotzan's advice, it took steps to comply with many of his recommendations. Indeed, all of the attorneys to whom UFSC referred customers were independent contractors who did not represent UFSC, in accordance with Kotzan's suggestion. The attorneys' decisions regarding the estate planning needs of the individual customers were never questioned by UFSC, and the attorneys were free to decide that an individual did not need any estate plan. In accordance with Kotzan's recommendation, the attorneys to whom UFSC referred customers always contacted the individual directly to assess the person's legal needs.

The only advice by Kotzan which was arguably not followed was his suggestion that UFSC's representatives who gather information from customers should act under the direction of an attorney. Kotzan did not cite any Indiana law to support this suggestion and did not make any reference to Rule 24. UFSC received contrary legal advice from other

attorneys which seemed more credible given that members of the public are allowed to collect the same information for other purposes, such as the sale of insurance, absent attorney supervision. Regardless, an unsupported statement in an attorney's opinion letter does not create Indiana law or provide notice to the public as to what conduct is prohibited. The State of Indiana has an obligation to announce what conduct is prohibited prior to punishing that conduct, and that obligation was not met.

The ISBA also suggests that the Petitioners knew that their conduct was prohibited because "UFSC devoted substantial resources to training its employees as to the boundaries of the practice of law." Br. in Opp. at 26. UFSC wholeheartedly agrees that it devoted substantial resources to train its representatives about UPL to the best of its ability to discern what conduct was lawful in Indiana. As a conscientious corporate citizen, UFSC wanted to ensure that its conduct complied with the law. Unfortunately, because the law was undefined, these efforts failed. The fact that UFSC could take these precautions and the Petitioners can still end up with monetary penalties imposed against them demonstrates the inherent injustice of Rule 24's enforcement.

Additionally, the ISBA criticizes the Petitioners for "tread[ing] so close to the line" between lawful and unlawful conduct. Br. in Opp. at 26. This argument only reinforces the Petitioners' point that Rule 24's vagueness will ultimately force the public to steer-clear of any conduct even touching-upon legal

subjects. If Indiana wants to prohibit UFSC's business model, or other business models, it is free to do so. If Indiana wants to define UPL through case law, it is free to do so. However, the federal constitution does not permit the State to penalize conduct until such time as the public is on notice that the conduct is prohibited. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[t]he dividing line between what is lawful and unlawful cannot be left to conjecture").

II. THE ISBA OVER-STEPPED CONSTITUTIONAL LIMITATIONS IN ITS PROSECUTION OF THIS ACTION BY INJECTING A PERSONAL FINANCIAL INTEREST INTO THE ENFORCEMENT PROCESS

The ISBA argues that it did not violate the Petitioners' due process rights by requesting a substantial monetary payment from them in exchange for reducing the time period for which it would seek disgorgement of fees collected by UFSC from fourteen years to two years. Br. in Opp. at 27-31. The ISBA defends its request by arguing that the court would need to approve any settlements. *Id.* Whether the ISBA ultimately would have sought court approval if the Petitioners had agreed to pay makes no difference with respect to the Petitioners' due process challenge, because the fact that a direct monetary payment was requested is enough to undermine the reliability of the proceeding. *See Adkins v. Commonwealth*, 492 S.E.2d 833, 835 (Va. Ct. App. 1997)

(the "prosecutor is vested with a duty not merely to convict, but to see that accused receives fair and impartial trial" . . . where a prosecutor has a "personal interest in the outcome of the prosecution, his objectivity and impartiality are called into question and a defendant's right to a fair and impartial trial is violated") (citations and quotations omitted).

Indeed, even if the ISBA had hypothetically submitted its proposal to the court for approval and the court had rejected it, the Petitioners' due process rights still would have been violated by the ISBA's continued prosecution of the action, because the ISBA has already demonstrated that improper factors entered into the prosecutorial decision-making process. There is no scenario that "cures" the due process violation because the ISBA's attempt to receive a payment from the Petitioners brings the ISBA's motives into question and creates a moral hazard that is inherently inconsistent with due process.

The ISBA argues that it should be entitled to request substantial monetary payments from individuals it prosecutes, analogizing itself to a government agency seeking reimbursement for expenses incurred in the enforcement process. Br. in Opp. at 30-31. Yet, the ISBA sought to gain much more than its expenses from the Petitioners. The ISBA separately specified in its "settlement" letter that the Petitioners would be required to pay all of the ISBA's attorney's fees and costs, in addition to the substantial payment it requested. Thus, the requested

payment cannot be classified as a mere reimbursement of expenses.

Furthermore, the ISBA's argument ignores the fact that it is not a government agency existing solely for purposes of protecting the public. Instead, it is an organization with many other objectives, including serving its members, who have an interest in discouraging non-attorneys from competing with attorneys. The ISBA has provided no legitimate explanation as to how its role as prosecutor can be constitutionally reconciled with its request for a substantial payment to itself.

III. RULE 24 ACTIONS REQUIRE DUE PROCESS SAFEGUARDS

The ISBA argues that the constitutional concerns raised by the Petitioners are inapplicable because defendants charged with Rule 24 violations are not entitled to due process. Br. in Opp. at 14-19. The ISBA argues that UPL proceedings are not quasi-criminal in nature but are instead akin to attorney disciplinary actions. *Id.* at 15. Yet, UPL proceedings and attorney disciplinary proceedings have critical differences. Most significantly, attorney disciplinary proceedings are always brought against individuals who voluntarily consent to the disciplinary process as a condition of bar membership. In contrast, Rule 24 cases are enforcement actions brought against members of the public on behalf of the State alleging that the accused engaged in prohibited conduct. This

description encapsulates the quintessential elements of a criminal proceeding, indicating that Rule 24 charges are quasi-criminal and require due process.

Moreover, Rule 24 charges are brought pursuant to the state's regulatory power, providing further evidence that such proceedings require due process. Although the Indiana Supreme Court has stated that the purpose of Rule 24 "is not to find fault or assess liability," liability is nonetheless found in these proceedings, and offenders who are found guilty may be subject to significant monetary penalties, like the penalties imposed here. Furthermore, the Indiana Supreme Court has stated that the Rule 24 disgorgement remedy is for purposes of deterrence. *Northouse*, 848 N.E.2d at 674 (disgorgement is "appropriate to deter similar conduct in the future"). Where a rule is predicated on deterrence, due process is implicated. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976) (the Court would "hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness").

The ISBA argues that if Rule 24 actions require due process, Indiana's criminal UPL provision would be rendered "superfluous." Br. in Opp. at 16. This argument fails because a State's decision to prohibit conduct under two separate laws cannot divest the accused of due process rights. Otherwise, States could routinely prohibit conduct under two laws to circumvent constitutional protections. Additionally, when the two laws were originally enacted, they were not superfluous because the criminal statute was

designed to punish past conduct, while Rule 24 was designed to enjoin future conduct. This distinction has waned now that disgorgement is a remedy for past conduct under Rule 24.

The ISBA also argues that the Petitioners are not entitled to due process because disgorgement is not a penalty but is an "equitable remedy designed to nullify any unjust enrichment when fees or other property are improperly acquired." Br. in Opp. at 11. Yet, this argument presupposes that the Petitioners had notice that their conduct was prohibited. Where an accused was not on notice that his conduct was prohibited such that he could intelligently choose in advance whether to engage in the conduct, it would be extremely inequitable to deprive him of his property. Furthermore, the ISBA's argument ignores that disgorgement was ordered not only against UFSC – the entity that collected the fees – but also against former representatives of UFSC who had no ownership interest in the corporation. These individuals are not being asked to return property that they unlawfully collected – they are liable to disgorge money that they never received in the first place, entitling them to due process.

CONCLUSION

For foregoing reasons, the Petitioners respectfully request that this Court GRANT their petition and issue a writ of certiorari.

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